(1)

SHDKT PROCEEDINGS AND ORDERS DATE: [02/23/93]

CASE NBR: [92105579] CFH STATUS: [DECIDED]
SHORT TITLE: [Dobbs, Wilburn]
VERSUS [Zant, Warden] DATE DOCKETED: [082092]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

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3	Sep 22 1992		Brief of respondent Zant, Warden in opposition filed.
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17	Jan 19 1993		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.

PREVIOUS 1 1 EXIT

Last page of docket

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	DATE	NOTE	PROCEEDINGS & ORDERS
18	Feb 18 1993		JUDGMENT ISSUED.

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(2)

92-5579

No. 92 -

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WILBURN DOBBS,

Petitioner-Appellant,

v.

WALTER D. ZANT, Warden,

Respondent-Appellee.

Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APEALS
FOR THE ELEVENTH CIRCUIT

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56 pp

QUESTIONS PRESENTED

1. When a Petitioner who is under a sentence of death proves that racial prejudice was a factor in his case, does this Court's decision in McCleskey v. Kemp require proof that the racial prejudice actually affected the jury's decision to impose the death penalty?

2. In light of the fact that the State of Georgia affirmatively misled the State and Federal Courts by asserting that the penalty phase of Petitioner's trial had not been reported, should the District Court and Court of Appeals have allowed the actual transcript of the Petitioner's penalty phase into the record once the transcript was discovered during the course of Petitioner's initial Federal Habeas Corpus proceeding, particularly where, as here, the penalty phase transcript demonstrated that the Petitioner received ineffective assistance of counsel during the sentencing phase of his trial?

3. Is the transcript of the penalty phase of Petitioner's death penalty trial such a fundamental part of the record that it must be allowed into the record where, as here, the transcript is relevant to a claim of constitutional error and is essential to determining the truth of what occurred at Petitioner's trial?

4. Must the transcript of the sentencing phase of Petitioner's trial be allowed into the record in light of the Court's recent jurisprudence which favors a single federal habeas corpus proceeding and in light of the State's misconduct in

misleading the federal courts as to the existence of the transcript?

5. Given the facts surrounding the State's concealment of the sentencing phase transcript, do the doctrines of "exhaustion" or "law of the case" prevent the lower courts from reconsidering Petitioner's claim of ineffective assistance of counsel at sentencing during his initial petition for federal habeas corpus review?

6. Are the jury instructions in the present case, which inform the jury (1) that there are "no standards" to guide them in their decision between life and death, (2) that they have "absolute discretion" to impose the death penalty and (3) that the "only standard, if any" that the jury would be allowed to consider in making its decision between life and death is the existence of a statutory aggravating circumstance, unconstitutionally inconsistent with the Court's death penalty jurisprudence?

7. Is it essential that a jury in a capital sentencing proceeding be informed that it must consider mitigating circumstances or is it sufficient that the jury not be prohibited from such consideration?

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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WILBURN DOBBS,

Petitioner-Appellant,

v.

WALTER D. ZANT, Warden,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner Wilburn Dobbs respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The District Court originally entered a judgment in Petitioner's favor on January 13, 1984. The Court of Appeals reversed the grant of relief and remanded the case to the District Court for consideration of sentencing phase claims on which it had reserved decision. Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986), modified, 809 F.2d 750 (1987), cert. denied, 481 U.S. 1059 (1987). The District Court's initial decision is

attached hereto as Appendix A. The Circuit Court decision is attached hereto as Appendix B.

Upon remand the District Court denied relief on the reserved issues on August 9, 1989. This decision is reported as Dobbs v. Zant, 720 F.Supp. 1566 (N.D. Ga. 1989) and is attached hereto as Appendix C.

On October 11, 1989, during a District Court authorized search of the superior court reporter's storage building, Petitioner's counsel discovered the stenographic notes of Petitioner's penalty phase hearing. Noting that post-judgment motions were already pending in the District Court, Petitioner filed a Motion to Expand the Record, a Motion for Leave to Amend his Petition and a Motion to Reopen and Reconsider certain issues, including ineffective assistance of counsel at the penalty phase, pursuant to Federal Rules of Civil Procedure 59 and 60. On March 6, 1990, the District Court denied all post-judgment motions. A copy of the District Court Order is attached and cited as Appendix D.

On appeal to the Court of Appeals, Petitioner filed a Motion to Expand the Record to include the penalty phase transcript and a Motion for Limited Remand for consideration of Petitioner's claims in light of the penalty phase transcript. These motions were denied by the Circuit Court on September 12, 1990. Copies of the Circuit Court Orders denying these motions are attached as Appendix E.

A panel of the Court of Appeals affirmed the District Court's denial of relief on October 25, 1991. Upon Petitioner's filing of a Motion for Rehearing and Suggestion for Rehearing En Banc, the panel opinion was withdrawn. On June 4, 1992, the panel issued a "corrected" opinion affirming the District Court judgment and denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc. Dobbs. v. Zant, ___ F.2d ___ (11th Cir., June 4, 1992). This opinion is attached and cited as Appendix F (Slip op., Page No. 2791).

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1992. The Court of Appeals stayed its mandate to and including August 3, 1992, pending the timely filing of a petition for writ of certiorari. A copy of that Order is annexed as Appendix G. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> (N)or shall cruel and unusual punishments (be) inflicted;

the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury...and to have assistance of counsel for his defense;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> (N)or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, which provides in pertinent part:

> The Answer shall indicate what transcripts (of pre-trial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished and also what proceedings have been recorded and not transcribed...The court on its own motion or upon request of the Petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the nontranscribed proceedings be transcribed and furnished.

This case also involves the following statutory provisions, the text of which are set forth in Appendix K; Georgia Code Annotated Section 5-6-41(d), Section 17-10-130(b) and Section 17-10-35(a).

STATEMENT OF THE CASE

A. RACIAL DISCRIMINATION AND THE UNITED STATES CONSTITUTION.

1. The Historical Setting.

At the time the United States Constitution was adopted in 1789, the State of Georgia had accepted slavery as an institution and soon thereafter enacted criminal laws which prescribed different penalties for criminal offenders depending upon their race and the race of their victim.[1]

---

[1] See generally, The Code of the State of Georgia (R.Clark, T. Cobb & D. Irwin, compilers 1861).

As Chief Justice Taney stated in the Dred Scott case, prior to the Civil War African-Americans were:

> ...regarded as being of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to accept...This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857).

While the end of the Civil War freed African-Americans from slavery, it also brought forth a resurgence of legally sanctioned discriminatory treatment of African-Americans in the penal codes throughout the South. See, Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).

Despite the passage of the Fourteenth Amendment, de jure discrimination in state criminal statutes continued to co-exist with the segregationist codes of the South such that:

> ...we...cannot deny, 114 years after the close of the War Between the States and nearly 100 years after Strauder [v. West Virginia, supra,] racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious. Rose v. Mitchell, 443 U.S. 545, 558-59 (1979).

2. Racism And The Death Penalty In Georgia.

Race as a factor in our criminal justice system has remained particularly persistent in the area of capital punishment. In 1972, the Court held that America's capital punishment statutes,

though fair on their face, were in practice so pervasively infected with racial bias that the death sentence was "wantonly and ... freakishly imposed" against African-American defendants. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring). Troubled by the arbitrary and capricious nature in which racism was allowed to infect capital sentencing decisions, Furman struck down the death penalty statute of Georgia and every other state that then imposed the death penalty. 408 U.S. at 249 (Douglas, J., concurring); 408 U.S. at 309-10 (Stewart, J., concurring); 408 U.S. at 364 (Marshall, J., concurring).

When Georgia's post-Furman statute subsequently came before the Court for review in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2902, 49 L.Ed.2d 859 (1976), the Court affirmed its holding in Furman that:

> ...[b]ecause of [its] uniqueness...the death penalty [may] not be imposed under sentencing procedures that create a substantial risk that it [will]...be inflicted in an arbitrary and capricious manner. 428 U.S. at 188.

In Gregg, supra, however, the Court upheld Georgia's statute because the procedural safeguards provided therein "seem to satisfy the concerns of Furman" that the death penalty not be systematically applied in an arbitrary and capricious manner. Id., at 198.

The Court next addressed the issue of race, the Georgia statute, and the requirement that criminal defendants not be

sentenced to death arbitrarily or capriciously in McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

In reaffirming its commitment "to eradicate racial prejudice from our criminal justice system", the Court held that the Eighth Amendment protected a capital defendant from an unacceptable risk of racial prejudice in his sentencing hearing. McCleskey, supra, 107 S.Ct. at 1775. The Court, however, found that since McCleskey's proof was based upon statistics, McCleskey failed to demonstrate that race was a factor in his particular case. Id., at 1767.

The Court, therefore, did not answer the question, **"At what point does the evidence of racial prejudice become sufficient to prove that the risk of racial prejudice is constitutionally unacceptable when race is a factor in a particular capital case?"**

In Mr. Dobbs' case, one involving an interracial offense in a rural Georgia county, the record reveals, and the lower courts have found, the existence of racial prejudice during his capital trial. Petitioner's case raises the precise question which was raised by the Court in McCleskey but left unanswered. If the goal is to identify and eliminate race as a factor in our criminal justice system, that question should be answered now.

3. Petitioner's Evidence: The Racism of the Community, The Jurors, The Defense Attorney and the Trial Judge.

This case presents a unique picture of racial prejudice influencing the decision to impose the death penalty in a Georgia murder case.

On May 22, 1974, Wilburn Dobbs, an African-American man, was convicted of robbery, assault and murder arising from the robbery of a grocery store run by Roy Sizemore, a white man, in rural Walker County, Georgia. Mr. Dobbs was sentenced to death (TT - 501, 519-520).[2] The offense occurred in a small segregated community in Walker County, Georgia, with a 96% white population and a history of Ku Klux Klan activity (PEN 15-17, 22, 42).

The District Court found that at the time of Petitioner's trial in 1974, race relations were on the minds of the citizens of Walker County. Significantly, the District Court also found that "Walker County's history of racial segregation appears to have had some influence on the values of...the jurors..." Dobbs, supra, 720 F.Supp. at 1578.

The District Court and the Court of Appeals found that all of the jurors in Mr. Dobbs' case possessed "some racial prejudice, some more so than others..." Dobbs v. Zant, 720 F.Supp. 1566, 1579 (1990); Dobbs v. Zant, ___ F.2d ___ (11th Cir., June 4, 1992) Slip op., p. 2795.

---

[2] The record in the instant case is confusing in that the trial transcript has been supplemented on several occasions resulting in a repetition of certain page numbers.
Citations to the record will be as follows:
Record Volume: tab:page
Trial Transcript (TT): page
Petitioner's Exhibit Number (PEN): page
Respondent's Exhibit Number (REN):page
Trial Transcript Voir Dire (TTVD): page
Trial Transcript Prosecutor's Guilt Close (TTPGC): page
Trial Transcript Sentencing Close (TTSC): page
First Supplemental Record (FSR): page
Federal Habeas Evidentiary Hearing (FHC): page

The District Court and the Court of Appeals found that Mr. Dobbs' court-appointed trial attorney "expressed beliefs, often in pointed ways, that blacks in general are inferior to whites morally and intellectually," and referred to Mr. Dobbs in front of the jury as "colored" and "colored boy." Dobbs, supra, 720 F.Supp. at 1578; Slip op., p. 2795-96.

The District Court and the Court of Appeals found that the trial judge also referred to the Petitioner during his trial as "colored" and "colored boy." Dobbs, supra, 720 F.Supp. at 1577; Slip op., p. 2795.

In fact, during Mr. Dobbs' trial, Mr. Dobbs and other African-Americans were referred to as "colored," "coloreds," "colored boys," "boys," "this boy" and "this" by the trial judge, the district attorney and Mr. Dobbs' court-appointed trial attorney (TTVD-39-61, 64, TT-96, 98, 110, 111, 112, 135, 141, 144, 170, 173, 181, 189, 223, 224, 292, 300, 301, 330, 333, 356, 363, 369, 374 and 375).

Concerning the effect of these references, the District Court stated:

> Further, the references at trial to Dobbs as "colored" may have had an influence on the jury's view of Dobbs as an individual. Although "colored" may have been an acceptable term when the judge and the attorney were growing up, their continued use, especially in a courtroom setting evinces a degree of insensitivity to black concerns. Id., at 1578.

The evidence developed by the Petitioner regarding the trial jurors, the court-appointed trial attorney and the trial judge is disturbing.

Two of the jurors on Mr. Dobbs' jury used the word "nigger" on occasion and one juror considered the word "nigger" a slang word and "not a bad word." Dobbs, supra, 720 F.Supp. at 1576.

Many of the jurors used the word "colored" in describing African-Americans and believed "that the races should mix to a limited extent only." Id. at 1578. One juror remarked:

> I just don't think the races should mix. I think they have just as much right to do things they are qualified to do and what they want to do as the white people, but I just don't think the races should mix. (PEN 6-27).

Another juror stated:

> Really, as a Christian, I believe in blacks marrying blacks and whites marrying whites. (PEN 3-22).

The District Court found that all of the jurors had "reservations about interracial dating and marriage." Dobbs, supra, 720 F.Supp. at 1525. According to one juror, her daughter could not date an African-American man because her daughter "would not have dared brought one home," and if she did, "I just wouldn't have allowed it. I just wouldn't -- they just wouldn't be welcomed, that's all." (PEN 7-18).

Two of the jurors feared African-Americans and found African-Americans to be "scarier than whites." Dobbs, supra, 720 F.Supp. at 1576, n.22. In referring to African-Americans, one juror stated:

> They may have had a little envious drive in their heart and thought they would get even

> with whites by stealing. I think that it was a lot of the problem. Trying to get even with the whites. (PEN 7-12).

Continuing, the juror added: "I would fear one on the street...I think all white women have that fear." (PEN 7-16).

The trial judge appointed an attorney to represent Mr. Dobbs who used the word "nigger" jokingly and, who, as found by the District Court, expressed beliefs "that blacks in general are inferior to whites morally and intellectually" Dobbs, supra, 720 F.Supp. at 1578.

In his deposition, Mr. Dobbs' court-appointed trial attorney made the following comments when questioned about his racial attitudes:

> For example, now, many of them are uneducated. I don't think uneducated would make good school teachers. I think most of them make good basketball players. (PEN 13-9).

> And I know if you call the State Capitol on business and get a black, you're probably going to get the wrong information. That's true if you call a lot of businesses. And my beliefs lead me to believe that when I recognized the voice of a black, I'm overly cautious to make sure that the information I am getting is correct. (PEN 13-11).

> Back when I was a kid, you'd hire a maid with the understanding, sort of understood, you'd pay her a certain amount a week, plus tote, what'd she'd walk off with, things, and nothing would be said about it. (PEN 13-16).

> I know that if you walk down the streets of Chattanooga, especially Martin Luther King, Jr. Boulevard at night, there's a good chance you're going to get robbed. (PEN 13-12).

When asked why he believed African-Americans possessed these inferior characteristics, Mr. Dobbs' court-appointed attorney sarcastically referred to his own slave-owning heritage:

> I don't have any idea. Maybe its caused by my granddaddy owning slaves.... I say that because every time something comes up about them being in trouble or disadvantaged or everything, that they themselves seem to attribute it to their prior condition of servitude. (PEN 13-38-39).

Counsel concluded by saying that "I don't think you can lay it all at the feet of slavery or something like that. It does seem that the Asians that come over here don't have the same problems as the blacks who have been here all the time...." (PEN 13-15).

During jury selection Mr. Dobbs' court-appointed attorney asked the jurors if "the fact that this man is colored (would) have any bearing whatsoever on your decision in this case?" (TTVD-64). There was no response from the jurors.

In addressing the court-appointed defense attorney's testimony, the District Court stated:

> He said that integration has led to deteriorating neighborhoods and schools, and referred to the black community in Chattanooga as "black boy jungle". He strongly implied blacks have inferior morals by relating a story about sex in a classroom...He said that blacks in Chattanooga were more troublesome than blacks in Walker County. 720 F.Supp. at 1577.

The trial judge in Mr. Dobbs' case was raised in Walker County during the era of racial segregation. Id., at 1577. From 1953 to 1963, prior to becoming a judge, he served in the Georgia House of Representatives and Georgia Senate. During his ten years in the Georgia legislature he participated with other members of the legislature in an effort to prevent racial

integration (PEN 14-29). He voted to prohibit all interracial social functions in Georgia, voted in favor of a resolution to impeach the Justices of the United States Supreme Court who decided Brown v. Board of Education, 347 U.S. 348, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954), and voted in favor of a resolution to abolish the Fourteenth and Fifteenth Amendments to the United States Constitution. (PEN 14-16). In 1965, after leaving the legislature, he was elected Superior Court judge, a position he held until 1981. (PEN 14-65, 83).

During the course of Petitioner's trial, his court-appointed trial attorney admitted Mr. Dobbs' guilt during cross examination of the State's witnesses. (TT-262, 317, 318, 319, 323, 324 and 325). In spite of this, at the conclusion of the State's case, Petitioner's court-appointed attorney called him as a witness, at which time Mr. Dobbs denied his involvement in the charged offenses.

Mr. Dobbs' court-appointed trial attorney introduced no evidence during the sentencing hearing. During his closing argument at the sentencing hearing he made no argument concerning the facts of the case, no argument concerning Mr. Dobbs' background, never mentioned Mr. Dobbs by name and never asked the jury to return a life sentence. In fact, of the seven pages of argument, six pages consisted of a verbatim reading from Justice Brennan's concurrence in Furman v. Georgia where Justice Brennan argued that the death penalty was actually carried out very rarely. (Attached hereto as Appendix J).

Finally, Petitioner's expert, Dr. Alex Willingham, a social and political scientist whose expert opinion has been relied upon on prior occasion by this Court, testified that racial prejudice permeated the community of Walker County, Georgia and gave rise to an us versus them mentality amongst its citizenry. (PEN 1-28). In Dr. Willingham's opinion, which was unrebutted, race was a salient factor which affected the daily, decisionmaking processes of the citizens of Walker County. (PEN 1-23-25, 35). It was Dr. Willingham's opinion that racial prejudice in Walker County would be a particular salient factor in a capital sentencing hearing because the us versus them mentality would create a type of racial retribution where one race would try to get even if it deemed it had suffered a loss. (PEN 1-27).

After reviewing the depositions of the individual jurors in Petitioner's case, Dr. Willingham's unrebutted conclusion was that "it would be unrealistic to expect" the jurors to set aside their racial attitudes.(PEN 1-35). To the contrary, Dr. Willingham stated that the prosecutor's, defense attorney's and trial judge's disrespect for Mr. Dobbs at trial "tapped into and activated the racial attitudes among the jurors." (PEN 1-33).

Petitioner asserts that the foregoing facts evidence an unacceptable risk that racial prejudice influenced the jury's decision to impose the death penalty in his case.

4. The Opinion Of The Court Of Appeals.

In its opinion, the Court of Appeals did not dispute the Petitioner's evidence which led the lower court to conclude that

the jurors, the court-appointed defense attorney, and the trial judge were racially prejudiced and believed African-Americans to be inferior to whites.

The Court of Appeals held that the proper standard to apply to Petitioner's Eighth Amendment claim was whether there was a constitutionally unacceptable risk that racial prejudice affected the Petitioner's sentencing. In applying that standard, however, the Court denied relief because Petitioner had failed to prove "that racial considerations in fact affected the jurors' decision to impose the death penalty." (Slip op., p. 2796). As stated by the Court of Appeals:

> Dobbs contends that the potential influence of racial prejudice upon the decision makers in his case violated his eighth amendment right. In such an instance, to show that the risk of racial prejudice influencing sentencing rose to a constitutionally unacceptable level, Dobbs must show that racial prejudice actually affected the jury's decision. (Slip op., p. 2796) (Emphasis added).

In so holding, the Court of Appeals failed to cite any authority.

Petitioner respectfully submits that the decision of the Court of Appeals is in conflict with two decades of Supreme Court jurisprudence which has never required a capital defendant to prove the actual affect of racial prejudice under the Eighth Amendment.

B. THE MISSING TRANSCRIPT OF PETITIONER'S SENTENCING HEARING.

1. Introduction

Pursuant to Georgia's death penalty statute, Petitioner's capital trial was bifurcated. The first proceeding was conducted to determine Mr. Dobbs' guilt or innocence. Upon finding Mr. Dobbs guilty, a sentencing hearing was conducted to determine whether Petitioner would be sentenced to life imprisonment or death.

From the time of Petitioner's initial appeal to the Georgia Supreme Court to his motion for reconsideration before the District Court, the transcript of Petitioner's sentencing hearing remained missing with the State and the court reporter maintaining that the hearing had not been reported.

On October 11, 1989, during a court-ordered search of the court reporter's storage building, the stenotype notes from Petitioner's sentencing hearing were found. For the first time in Petitioner's case the truth about what occurred during that hearing was known. The truth conflicted with the previous testimony of Mr. Dobbs' court-appointed trial attorney. Unfortunately, rather than admitting the sentencing hearing transcript into the record, the District Court and the Court of Appeals refused to review the transcript and allowed their previous opinions, which were undisputedly based upon false testimony, to stand.

2. Petitioner's Diligence In Requesting the Sentencing Hearing Transcript And The State's Failure To Comply

Mr. Dobbs' first Notice of Appeal to the Georgia Supreme Court, filed on October 31, 1975, stated:

> The Clerk of the Court will please omit nothing from the record on appeal. The transcript of evidence and proceedings will be filed for inclusion in the record on appeal.

O.C.G.A. § 17-10-35(a) in effect as Code Annotated, Section 27-2537(a) in 1974, required the clerk of the trial court to transmit "the entire record and transcript" of a death penalty proceeding to the Supreme Court for appellate review. O.C.G.A. § 5-6-41(d) clearly mandated that all portions of the trial actually taken down be transcribed ("...it being the intention of this Article that all these matters appear in the record.").

The record on appeal to the Georgia Supreme Court was supplemented on December 8, 1975, by inclusion of the jury voir dire and the closing argument of the prosecutor during the guilt/innocence portion of the trial.

In 1979, while Petitioner was pursuing an Extraordinary Motion for New Trial in the Walker County Superior Court, Petitioner continued to seek inclusion of the sentencing phase transcript and filed a Motion for Supplemental Record with the trial court, asking for the following:

> That all portions of the record of this case which have not previously been transcribed and/or which are not currently lodged with the Supreme Court of Georgia be prepared, certified and transmitted to the Supreme Court of Georgia. (REN 9).

The transcript of the sentencing phase hearing was not produced at that time.

3. The State's Affirmative Concealment Of The Transcript Through The Submission Of False Affidavits.

Upon filing his petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, Petitioner filed a Motion to Expand Record, pursuant to Habeas Corpus Rule 5. This motion specifically requested that the transcript of the sentencing phase of Petitioner's trial be included in the record or that an accounting of "non-transcribed" proceedings be submitted as required by Rule 5.

In its supplemental response to Petitioner's Motion, the State filed sworn affidavits from the court reporter, Mr. Dobbs' court-appointed defense attorney, and the trial judge. The affidavit of the court reporter affirmatively stated that he had reviewed his notes from Petitioner's trial and that he "did not report the closing argument given by the district attorney at the sentencing phase of the trial." The affidavit of the defense attorney stated that to the best of his knowledge and belief the court reporter "did not transcribe or report the closing arguments of either counsel made at the sentencing phase of the trial." Finally, the trial judge stated that "it was not required by law nor was it a local rule of the Court to require the reporting of closing arguments in felony cases." See Appendix H.

Without the sentencing hearing transcript, the courts relied upon the testimony of Petitioner's court-appointed trial attorney to prove what occurred during Petitioner's sentencing hearing.

Concerning his effectiveness in representing Petitioner at his sentencing hearing, trial counsel testified that he did not present any evidence in mitigation because he decided to make an argument in mitigation that the shooting was "impulsive" and that Mr. Dobbs should be sentenced to life imprisonment.

4. The District Court And The Court Of Appeals Based Their Decisions Upon The False Testimony Of Petitioner's Court-Appointed Trial Attorney.

In denying Petitioner's claim of ineffective assistance of counsel, the District Court and the Court of Appeals based their decisions on trial counsel's false testimony that he made the tactical decision not to present any evidence in mitigation because of his decision to make an argument in mitigation that the shooting was impulsive and did not warrant the death penalty.

With the discovery of the sentencing hearing transcript it is now known that trial counsel's testimony was false and that the District Court and Court of Appeals decisions are, therefore, founded upon a false record.

5. The Sentencing Hearing Transcript Reveals That Trial Counsel's Testimony Concerning The Sentencing Hearing Was False And That His Representation Was Not Only Ineffective But Affirmatively Harmful To Petitioner's Interests.

With the benefit of the transcript of the sentencing hearing we now know that trial counsel's testimony concerning his strategy and his argument was false.

Trial counsel originally testified that he argued that:

1) The slaying itself was "probably impulsive;"

2) Mr. Dobbs was "frightened and shot him in fleeing to aid the escape;"

3) Key testimony which indicated that Mr. Dobbs had attempted to harm a victim at the hospital after the shooting could not have been true;

4) Given the circumstances of this murder it was not the type of offense which merited the death penalty, and therefore;

5) Mr. Dobbs should be given a life sentence. (FHC: 70-71).

The actual transcript of the sentencing hearing reveals that:

1) Trial counsel never argued that the slaying was "probably impulsive";

2) Trial counsel never argued that Mr. Dobbs was "frightened and shot him in fleeing to aid the escape";

3) Trial counsel never argued that key testimony which indicated Mr. Dobbs had attempted to harm a victim at the hospital after the shooting could not have been true;

4) Trial counsel never argued that given the circumstances of this murder it was not the type of offense which merited the death penalty; and

5) Trial counsel never argued that Mr. Dobbs should be given a life sentence. (Appendix I).

In fact the transcript of the sentencing hearing reveals that:

1) Of the seven pages of trial counsel's closing argument, which comprised the entire defense case at sentencing, six of the pages are a verbatim reading from a concurring opinion in Furman v. Georgia; (Appendix J).

2) Trial counsel diminished the jurors' sense of responsibility by informing them that previous death penalty statutes, including Georgia's, had been found

unconstitutional by the United States Supreme Court and that Georgia's current death penalty statute would be similarly reviewed by the United States Supreme Court;

3) Trial counsel further diminished the jurors' sense of responsibility by informing them that the actual imposition of the death penalty was rare and that, in fact, no executions had been carried out in the United States in the past seven years; (TTSC:3)

4) Trial counsel never argued a single fact in mitigation about Mr. Dobbs' background;

5) Trail counsel never argued a single fact in mitigation abut the crime;

6) Trial counsel never referred to Mr. Dobbs by name (Appendix I); and

7) Trial counsel never asked the jury to return a sentence of life imprisonment.

6. The Opinion Of The Court Of Appeals

The Court of Appeals held that its prior decision concerning ineffective assistance of counsel was not reviewable because it remained the law of the case.

Additionally, the Court of Appeals affirmed the District Court's holding that:

> The issues that Dobbs wants reopened...were decided prior to the Eleventh Circuit remand. The remand order limited this Court's consideration to issues upon which this Court had reserved judgment. If Dobbs wants to present additional evidence on other issues, he must do so in a separate proceeding....
>
> (T)o the extent that the claims Dobbs wants reconsidered are based on the closing arguments of the sentencing phase, they should be heard initially in state court. (Slip op., p. 2797-2798).

The District Court also found that:

> On the other hand, the entire transcript should have been made available for Dobbs' direct appeal, and the State represented to this Court that the sentencing phase closing arguments could not be transcribed. Dobbs' position that he

legitimately relied on the State's representation is well taken. (Appendix D, p.4).

Petitioner asserts that the actual sentencing transcript is a fundamental, material and constitutionally crucial portion of the record which should be made a part of the record herein, particularly in light of its relevance to Petitioner's claim of ineffective assistance of counsel.

C. THE UNCONSTITUTIONAL PENALTY PHASE JURY INSTRUCTIONS.

At the conclusion of the sentencing hearing, Petitioner's jury was instructed regarding sentencing on all capital and non-capital counts. When the trial judge reached the murder count he gave the following instructions:

> Now I instruct you our law says in arriving at your verdict in these cases, beyond prescribing the limits which a jury can go, the law provides no standards for the guidance of the jury in the selection of the penalty but rather permits the whole matter of determining which penalty shall be fixed to the judgment, conscience, and absolute discretion of the jury.
>
> The only standard, if any, that you will be permitted to consider in arriving at whether or not you will inflict the death penalty is the question of whether or not you find beyond a reasonable doubt that this Defendant committed the offense of murder while engaged in the commission of another capital felony. (Emphasis added) (TT-513).

This instruction provided the jury with an unconstitutional statement of the law. It was particularly harmful to inform the jury that there were "no standards" to guide them in determining between life and death and that the "whole matter of determining which penalty shall be fixed (rested with) the judgment, conscience and absolute discretion of the jury." The instruction

constituted an open invitation to the influence of passion, prejudice, and arbitrariness, including the racial prejudices of the jurors who actually decided that Mr. Dobbs' should be put to death.

Further, the instruction that the "only standard, if any" that the jury would be permitted to consider in determining whether to impose the death penalty was whether the jury found the statutory aggravating circumstance, violated the Court's jurisprudence regarding consideration of mitigating circumstances.

Although the Court of Appeals referred to the trial court's mere mention of argument in mitigation prior to the penalty phase, there is absolutely no mention of mitigation, the character of the Petitioner or the facts of the offense as matters to be considered by the jury during their deliberations. The jury was never instructed to avoid the influences of passion, prejudice or other arbitrary factors.

As noted by the United States Magistrate who first considered the jury instruction:

> While the jury was told that the Petitioner's punishment was within their discretion, they were told that the only standard which they could consider concerned the existence of aggravating circumstances (RSP. Exh. 2, p. 513). A reasonable juror, upon receiving this instruction, would not have been aware of his obligation to consider mitigating circumstances in making his determination. (Magistrate's Report, August 26, 1983, p.56).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO CONSIDER WHETHER AN AFRICAN-AMERICAN UNDER A SENTENCE OF DEATH WHO CAN DEMONSTRATE THAT RACIAL PREJUDICE WAS A FACTOR IN HIS SENTENCING HEARING MUST PROVE THAT RACIAL PREJUDICE "ACTUALLY AFFECTED" THE JURORS DECISION TO IMPOSE THE DEATH PENALTY.

This Court's post-Civil War jurisprudence has been marked by a commitment to identify and eliminate the effects of racial prejudice in our criminal justice system. See, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Neal v. Delaware, 103 U.S. (Otto) 370, 26 L.Ed. 567 (1881); Ex Parte Virginia, 100 U.S. (10 Otto) 339, 25 L.Ed. 676 (1880).

The Court has been particularly vigilant in this endeavor when the State seeks to execute an African-American and entrusts a jury with the discretion to decide whether that person should live or die. In addressing this issue the Court stated that:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected...[A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether Petitioner's crime involved the aggravating factor specified under Virginia law....More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks which could easily be stirred up by the violent facts of Petitioner's crime, might incline a juror to favor the death penalty.
>
> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence...We have

> struck down capital sentences when we found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty (may have been) meted out arbitrarily or capriciously' or through 'whim...or mistake' Turner v. Murray, 476 U.S. 28, 35-36, 106 S.Ct. 1683, 1687-88, 90 L.Ed.2d 27: citing Caldwell v. Mississippi, 472 U.S. 320, 343, 105 S.Ct. 2633, 2647, 86 L.Ed.2d 231 (1985) (O'Conner, J. concurring in part and concurring in judgment).

Historically, the Court's jurisprudence has evaluated the issue of racial prejudice, discretion and the death penalty under the Eighth Amendment within the context of Georgia's death penalty statute. See, Furman, supra, Gregg, supra, McCleskey, supra.

At no time has that jurisprudence required a defendant to prove under the Eighth Amendment that racial prejudice actually affected the juror's decision to impose the death penalty. To the contrary, the Court has historically evaluated the issue in terms of risk.

In Furman, supra, the Court did not find that racial prejudice actually affected jurors' decisions to impose the death penalty. In fact, Justice Douglas referred to the impossible "task...[of] divin[ing] what motives impelled these death penalties." 408 U.S. at 253.

In Gregg, supra, the Court, in reaffirming its intolerance for racism in the capital sentencing process stated that "the death penalty [may] not be imposed under sentencing procedures that create a substantial risk that it [will]...be inflicted in an arbitrary and capricious manner." Gregg, supra, at 188. (Emphasis added).

In reaffirming its commitment "to eradicate racial prejudice from our criminal justice system" the Court held that the Eighth Amendment protected a capital defendant from a "constitutionally unacceptable risk" of racial prejudice in his sentencing hearing. McCleskey, supra, 107 S.Ct. at 1775 (Emphasis added).[3]

Relief was denied in McCleskey under the Eighth Amendment, however, because there was no evidence "that race was a factor in McCleskey's particular case." Id.

There can be no doubt that race was a factor in Mr. Dobbs' sentencing hearing. The Petitioner has demonstrated that, and the lower courts have found that, in his particular case, the community in which he was sentenced, the jurors who sentenced him to death, the defense attorney who represented him at the sentencing hearing and the trial judge who presided over his sentencing hearing were all racially prejudiced.

The Court of Appeals held, however, that said proof was insufficient because the Petitioner "must show that racial

[3] The Court's traditional emphasis on "risk" in evaluating a claim of racial prejudice under the Eighth Amendment has always been clearly distinguished from the specific intent standard required under the Fourteenth Amendment. McCleskey reaffirmed the Court's long-held adherence to the differing standards under the Fourteenth Amendment and the Eighth Amendment. Under the Fourteenth Amendment, the Court addressed the issue in terms of "purposeful discrimination" and, "discriminatory effect". McCleskey, supra, 107 S.Ct. at 1755, citing Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 15242, 1531, 84 L.Ed.2d 547 (1985). With respect to the Eighth Amendment claim the Court addressed the issue in terms of "risk". McCleskey, supra, 107 S.Ct. at 1775.

prejudice actually affected the jury's decision." (Appendix F, Slip op., p. 2796).

This extraordinary requirement is contrary to the Court's prior jurisprudence concerning racial prejudice, the death penalty and the Eighth Amendment.[4]

The Court has always "acknowledged the difficulty of divining the jury's motivation in an individual case", McCleskey supra. at 1783 (Brennan, J., dissent). Thus, it is imperative, when evaluating the influence of racial prejudice that a court not rely upon broad, subjective denials of racial prejudice, but that it analyze objective indicia which are suggestive of racial prejudice. Casteneda v. Partida, 430 U.S. 482, 498 n.19 97 S.Ct. 1272, 1282, 57 L.Ed.2d 498 (1977); Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972).

The Court has also always required a heightened level of scrutiny for racial concerns in the context of a death penalty case. In Turner v. Murray, supra, the Court acknowledged that capital sentencing proceedings are uniquely vulnerable to the infection of racial prejudice: "We are convinced that such [sentencing] discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to fact finding." Id., 106 S.Ct. at 1088, n.8.

[4] The extraordinary nature of this requirement is obvious in that no juror will admit to sentencing a defendant to death because the defendant was an African-American. Even if a juror were inclined to so testify, arguably Federal Rule of Evidence 606(b) would prohibit the inquiry as an invasion of the deliberative process of the juror.

The decision by the Court of Appeals has ignored this Court's precedent concerning race. By evaluating racial prejudice in terms of actual affect rather than risk, the Court of Appeals not only failed to follow the historical progression of Furman, Gregg and McCleskey, but also ignored well-established jurisprudence which has traditionally been based upon "risk" and has not required a movant to prove that an improper extraneous factor "actually affected" the jury's decision.

In United States v. United States Gypsum Company, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 895 (1978), the Court did not require the defendant to prove that the ex parte meeting between the trial judge and the jury foreman actually affected the juror's deliberations. The Court reversed the defendant's convictions based upon a risk of affect.

In Parker v. Gladden, 385 U.S. 363, 365, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), the Court did not require the defendant to prove that the statements from a bailiff to certain jurors affected the juror's deliberations. The Court reversed the defendant's conviction based upon the "probability that prejudice will result."

In Sheppard v. Maxwell, 384 U.S,. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), the Court did not require the defendant to prove the actual affect of the pre-trial publicity on the jurors. The defendant's conviction was reversed because of the likelihood that said publicity was prejudicial.

In Remmer v. United States, 350 U.S. 377, 382, 76 S.Ct. 425, 100 L.Ed.2d 435 (1956), the Court did not require the defendant to prove actual affect of an outsider's conversation with a juror concerning the case. The Court reversed the defendant's conviction because the conversation "may have influenced" the jurors.

While the actual affect of any extraneous factor is inherently difficult to quantify within our system of criminal justice, there can be no doubt that the effect of racial prejudice may be the most difficult. By requiring Petitioner to prove that the jurors' subjective intent led them to purposely discriminate against the Petitioner and sentence him to death because he was an African-American, the Court of Appeals has required the Petitioner to do what realistically cannot be done, and has, in effect, accepted the racial prejudice in Petitioner's case. The Court of Appeals cited no authority and provided no analysis to justify such a requirement. This Court should not allow such a ruling to stand and should grant certiorari.

II. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE ADMISSIBILITY OF THE SENTENCING HEARING TRANSCRIPTS INTO THE FEDERAL COURT RECORD AND TO CLARIFY THE DEVELOPING HABEAS CORPUS JURISPRUDENCE FAVORING A SINGLE PETITION, FINALITY AND JUDICIAL ECONOMY.

The discovery of Petitioner's sentencing hearing transcript, which resulted from a court-authorized search of the court reporter's storage room, proved that the record upon which the instant case had previously been decided was false.

Petitioner sought the sentencing hearing transcript from day one: in his original notice of appeal, through inquiry to the court reporter, with a motion in state court and in a motion to the District Court pursuant to Habeas Corpus Rule 5, after the State failed to include the transcript with its original Answer or make an accounting for the absence of the transcript.

In response to the motion in District Court, the State filed the affidavits of the court reporter, Petitioner's court-appointed defense attorney and the trial judge. The three affidavits asserted that the sentencing hearing had not been reported. (Appendix H, Attachments "1", "2" and "3"). This was not true.

In denying the Petitioner's Motion to Supplement the Record with the actual sentencing hearing transcript, the District Court stated:

> ...the entire transcript should have been made available for Dobbs' direct appeal, and the State represented to this Court that the sentencing phase closing arguments could not be transcribed. Dobbs' position that he legitimately relied on the State's representation is well taken. (Appendix D, p.4)
>
> Continuing, the District Court stated:
>
> In weighing the interests of comity and federalism, the Court finds that, to the extent that the claims Dobbs wants reconsidered are based on the closing arguments at the sentencing phase, they should be heard initially in the state court. (Appendix D, p.4).

On appeal, Petitioner filed a motion to supplement the record on appeal with the sentencing hearing transcript, together with a Motion for Limited Remand, which requested that the District Court be ordered to reopen and reconsider certain

issues, including Petitioner's claim of ineffective assistance of counsel during the sentencing phase. The Court of Appeals denied these motions and the actual transcript of the sentencing hearing has never been allowed into the record.

The Petitioner's request that his sentence of death be reviewed upon the true record can only be described as fundamental and elementary. Gardner v. Florida, 430 U.S. 349, 359, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1978).

This Court's jurisprudence, particularly its most recent jurisprudence, as well as the interests of fairness, finality and judicial economy mandate that the sentencing hearing transcript be allowed into the record herein and that Petitioner's ineffective assistance of counsel claim be reconsidered in light of the true record.

1. The Integrity Of The Writ Of Habeas Corpus Demands That The State Not Benefit For Its Misconduct By Forcing Petitioner Into A Successor Writ Position

This Court's recent jurisprudence concerning federal habeas corpus has focused on the need for litigating all claims in the initial habeas corpus proceeding and has established increasingly stringent procedural rules in the path of a successor writ. See, Sawyer v. Whitley. ___ U.S. ___ (1992); Keeney v. Tamayo-Reyes, ___ U.S. ___ (1992); Coleman v. Thompson, 501 U.S. ___ (1991); McCleskey v. Zant, 499 U.S. ___ (1991); Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); Murray v. Carrier,

477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

As the Court recently stated in Sawyer:

> Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) successive claims which raise grounds identical to grounds heard and decided on the merits in a previous petition, (b) new claims, not previously raised which constitute an abuse of the writ, or (c) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims. 60 USLW at 4657[5] (Emphasis in original). The heightened procedural requirements are founded upon an emphasis on the heavy burden of scarce judicial resources and "the State's interest in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors". Keeney v. Tamayo-Reyes, 60 USLW 4339, 4341 (1992)(citations omitted).

In the case at bar, the policy goals of judicial economy and finality would be promoted by granting Petitioner a federal review of his original habeas corpus claims based upon the true and complete record in his case. Petitioner should not have to file a successive petition which raises claims which were raised in his initial petition in order to have those claims reviewed based upon the true and complete record in his case.

The only reason Petitioner is in this position is because the State failed to meet its statutory obligation to produce a full record of the trial proceedings in Petitioner's case and

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[5] In the context of a capital case, the lone exception to the rule is Petitioner's ability to prove "actual innocence" as to the aggravating factors alleged at trial which allowed him to be "death eligible". This is an extremely difficult standard to meet. See Sawyer v. Whitley, ___ U.S. ___, 60 USLW 4655 (1992).

then affirmatively concealed the sentencing hearing transcript by submitting false affidavits in federal court.

A State's efforts to conceal its misconduct precludes the consequences of said misconduct from constituting a procedural bar to a habeas corpus petitioner. Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

Considering the facts of the instant case, the transcript of Petitioner's sentencing hearing should be allowed in the record and the Petitioner's claim of ineffective assistance of counsel should be reviewed based upon that transcript. To do otherwise would reward the State for its misconduct, prejudice the Petitioner and would be contrary to recent decisions of this Court which have emphasized the importance of the litigation of all issues in a litigant's initial federal habeas corpus proceeding.

2. The Sentencing Phase Transcript Is A Fundamental And Necessary Part of the Record.

In Gardner v. Florida, 430 U.S.349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) the Court emphasized the constitutional requirement of a full appellate record:

> ...it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia, supra, 430 U.S. at 362, 97 S.Ct. at 1206.

Federal Habeas Corpus Rule 5 anticipates the inclusion of the entire trial transcript in the record for federal review.

"The obligation to come forward with the state court record is squarely upon the Respondent, not the Petitioner." Bundy v. Wainwright, 808 F.2d 1410, 1415 (11th Cir. 1987). The Respondent in the instant case failed to meet that obligation and instead affirmatively misled the federal courts by submitting false affidavits alleging that the sentencing hearing was not reported.

The transcript of Petitioner's sentencing hearing is of fundamental importance to a fair review of Petitioner's sentence of death. See, Gregg v. Georgia, supra, at 167, 96 S.Ct. at 2922; where the Court notes the fundamental importance of review of the "complete record."

It is of such fundamental importance that where, as here, the transcript is material to an issue before the federal court, it must be made a part of the record.

3. Exhaustion Is Not The Issue

The District Court and the Court of Appeals held that the state courts must first review any issue involving the sentencing phase transcript as a matter of exhaustion.

Exhaustion is not the issue for two reasons.

First, the issue of ineffective assistance of counsel was previously raised and decided in state court. It has been exhausted. There is no question that neither the character nor the nature of the claim has changed so much as to render the claim unexhausted. See, Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

Second, it is the State's fault that the sentencing hearing transcript was not previously revealed to the state or federal courts and, now, the lower courts have issued opinions concerning ineffective assistance of counsel which were based upon a false record. The State submitted false affidavits to the District Court in response to its obligation under Habeas Corpus Rule 5 concerning the existence of the sentencing hearing transcript. It is a uniquely federal question that, as a result of the State's conduct, both the District Court and the Court of Appeals have issued opinions based upon a false record.

The Eighth Circuit was faced with a similar situation in Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985) (en banc) cert. denied, 478 U.S. 1020, 106 S.Ct. 3332, 92 L.Ed.2d 738 (1986). In that case the Circuit Court took appropriate action when it discovered that it had been misled by the State's evidentiary representations. The Eighth Circuit withdrew its mandate and ordered the District Court to grant relief based upon the true facts of the case. Such action is appropriate in Petitioner's case.

4. Law Of The Case Is Not The Issue

Having rendered a previous opinion in Petitioner's case, prior to the discovery of the sentencing hearing transcript, the Court of Appeals held that its previous opinion constituted the law of the case and therefore precluded further review based upon the sentencing hearing transcript.

In the context of the instant death penalty habeas corpus action, reliance upon the law of the case doctrine with respect to Petitioner's claim of ineffective assistance of counsel at sentencing is misplaced.

In Standard Oil Co. of California v. United States, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976), the Court ruled that a District Court could entertain a Rule 60(b) motion without leave of the higher court even though the issue asserted had been affirmed in an earlier decision. The Court noted that the federal district courts are perfectly capable of ferreting out frivolous motions and that it would be a waste of judicial resources to require appellate court approval to reconsider or reopen a district court decision which had been affirmed on appeal.

Additionally, this Court has recognized that the doctrines of res judicata and "law of the case" are not inexorable commands and that justice must be the ultimate objective. See, Wright v. West, ___ U.S. ___ (decided June 19, 1992, Slip op., p. 8, n.3), Liljeberg v. Health Sources, Corp., 486 U.S. 847, 100 S.Ct. 2194, 100 L.Ed.2d 855, 874 (1988), Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed.2d 266 (1949), Standard Oil Co. of California v. United States, supra.

Justice in the instant case is allowing the sentencing hearing transcript in the record and reviewing Petitioner's claim of ineffective assistance of counsel based upon what actually happened at his sentencing hearing.

5. The Integrity Of The Federal Courts Demands That The False Record Upon Which The Holding In Dobbs V. Zant, 790 F.2d 1499 (11th Cir. 1987) Is Founded Be Corrected.

The previous rulings by the District Court and the Court of Appeals concerning Petitioner's claim of ineffective assistance of counsel at sentencing are based upon facts which are known to be false. Admission of the sentencing hearing transcript into the record will allow a review of Petitioner's claim of ineffective assistance of counsel at sentencing to finally be based upon what actually happened at the sentencing hearing.

Contrary to the previous finding made by the Court of Appeals, the sentencing hearing transcript reveals that not only did Petitioner's court-appointed defense attorney do nothing positive to represent the Petitioner at sentencing but that the attorney's representation was affirmatively harmful.

Trial counsel introduced no evidence in mitigation during Petitioner's sentencing hearing. Counsel's closing argument primarily consisted of a verbatim reading from a concurring opinion in Furman v. Georgia, where Justice Brennan argued that the death penalty is rarely carried out. In so doing counsel diminished the juror's sense of responsibility with regard to imposition of the death penalty. Counsel also never argued a single fact about Mr. Dobbs' background or about the offense in mitigation, never referred to Mr. Dobbs by name, and never asked the jury to return a sentence of life imprisonment. (RE-308, et seq., TTSC). In concluding his argument to the jury, trial counsel stated:

> I'm sure that all of you, in considering this man's sentence, will be judged by your conscience. I can only ask that in considering the punishment, that you inflict[6] one that you feel you can live with. (TTSC:8).

The sentencing hearing transcript establishes Petitioner's right to relief. Compare, Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). In Horton, the death sentence was reversed based upon ineffective assistance of counsel where trial counsel introduced no evidence in mitigation, gave a closing argument which encouraged rather than discouraged the imposition of the death penalty, and where Horton proffered affidavits of persons who would have testified for him in mitigation at the penalty phase. All of these factors are in Petitioner's case if one reviews what actually occurred at Petitioner's sentencing hearing.

It is the integrity of the federal judicial process which is at stake in the instant case. The State's failure to produce the sentencing hearing transcript pursuant to Habeas Corpus Rule 5 and Petitioner's motion in District Court to supplement the record is a uniquely federal issue which should be addressed by the Court. The Court should not tolerate the fact that the lower courts were misled by the false affidavits submitted by the State. The Court should not allow previous opinions of the lower

[6] Inflict - To cause or carry out by physical assault or other aggressive action. The American Heritage Dictionary, Second College Edition, 1982.

federal courts to stand which were based upon testimony we know to be false.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A GEORGIA CAPITAL SENTENCING JURY MAY BE INFORMED THAT THEY HAVE "ABSOLUTE DISCRETION" TO IMPOSE THE DEATH PENALTY, THAT THERE ARE "NO STANDARDS" TO GUIDE THEM IN THEIR DECISION BETWEEN LIFE AND DEATH AND THAT THE "ONLY STANDARD, IF ANY" THAT THE JURY WOULD BE ALLOWED TO CONSIDER IS THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE.

The Court has consistently held that where discretion is afforded to a jury to determine between life and death, the jury must be guided by clear standards which focus the jury on the character of the defendant and the nature of the crime. Such discretion "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976), California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

The jury instructions in this case utterly fail to satisfy this basic constitutional principle. This is particularly true in the present case because of the likelihood that racial prejudice would influence the jury's decision.

During the only portion of the jury instruction that dealt directly with sentencing on the murder charge the trial court gave the following instruction:

> Now I instruct you our law says in arriving at your verdict in these cases, beyond prescribing the limits which a jury can go, the law provides no standards for the guidance of the jury in the selection of the penalty but rather permits the whole matter of

> determining which penalty shall be fixed to the judgment, conscience, and absolute discretion of the jury.
>
> The only standard, if any, that you will be permitted to consider in arriving at whether or not you will inflict the death penalty is the question of whether or not you find beyond a reasonable doubt that this Defendant committed the offense of murder while engaged in the commission of another capital felony. (Emphasis added) (TT-513).

In the first paragraph the trial judge informed the jury that there are **"no standards"** for their guidance in selecting between life and death. This statement is a complete contravention of all Supreme Court jurisprudence.

In the same sentence the Court informs the jury that the law "permits the whole matter of determining which penalty to be fixed to the **judgment, conscience and absolute discretion** of the jury." Again, this instruction reiterates that there are no standards to guide the jury and could even be taken to mean that the worst prejudicial instincts could legitimately provide the basis for imposing the death penalty. There is no hint that the jury should consider the character of the Defendant, the nature of the crime or any perceived mitigating factors as a basis for choosing between life and death. There is no cautionary instruction to avoid the influence of passion, prejudice or other arbitrary factors.

The instructions conclude by telling the jurors that the **"only standard, if any,"** that they would be allowed to consider would be the existence of the statutory aggravating circumstance. For the third time the Court misled the jury and stated that the

only possible standard to guide the jury would be the existence of the statutory aggravating circumstance. Certainly, such an instruction improperly informed the jury that any mitigating circumstances they may find are not a legitimate basis for deciding upon a sentence. See, Gregg v. Georgia, supra, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) and Morgan v. Illinois, ___ U.S. ___, 38 USLW 4541, 4543 (1992).

The entire rationale of Gregg v. Georgia, supra, is that the jury's discretion must be "controlled by clear and objective standards" which focus the jury on the circumstances of the offense and the character of the defendant. Id., at 197, 96 S.Ct. at 2936.

The United States Magistrate who initially considered this case recognized that a reasonable juror who heard the instructions in this case would not have been aware of his obligation to consider mitigating circumstances (Magistrate's Order, August 26, 1983, p. 56).

The result is that the jury in the present case was allowed to do exactly what the jury in Furman's case did: impose the death penalty without clear and objective standards for deciding between life and death. As in Furman, there is a very real possibility that the death sentence was influenced by passion and racial prejudice.

The Circuit Court's view that the jury instruction, as a whole, adequately limited the jury's discretion is inconsistent with this Court's jurisprudence. In the first instances, there

are no other instructions which would provide proper guidance to the jury. Assuming, arguendo, that something in these instructions pointed the jurors in the right direction, the Court has repeatedly stated that where there are two conflicting jury instructions, one of which is unconstitutional and "it is equally likely that the verdict...rested on an unconstitutional ground 'the jury decision would be reversed.'" Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990), citing Bachellar v. Maryland, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316, 25 L.Ed.2d 570 (1970). See also, Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). Since it is highly likely that the jurors would believe that there were no standards for their guidance, or that the only standard for their guidance as between life and death was the existence of the statutory aggravating circumstance, the jury decision must be reversed.

Even if the jury instructions are merely "ambiguous" and subject to an erroneous interpretation, there still existed a "reasonable likelihood" that the jury would have applied the challenged instructions in a way that prevented it from consideration of relevant mitigating evidence or argument. See, Boyde v. California, supra, 110 S.Ct. 1198 and Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475, 482, ___ L.Ed.2d ___ (1991).

As stated by the Magistrate:

> "A reasonable juror, upon receiving this instruction, would not have been aware of his obligation to consider mitigating

> circumstances in making his determination." (2:25, at p.56).

Petitioner further reiterates that given the extreme level of racial prejudice amongst the jury, court-appointed defense attorney and trial judge in this case, these jury instructions do not adequately protect Mr. Dobbs from the influence of passion, prejudice and other arbitrary factors.

Under the best of circumstances the Georgia death penalty scheme provides no systematic means for eliminating the effects of passion, prejudice and other arbitrary factors from the capital sentencing procedure, at the trial level. As noted in Zant v. Stephens, 462 U.S. 862, 871-72, 103 S.Ct. 2733, 2740, 77 L.Ed.2d 235 (1983), only the Georgia Supreme Court determines whether a death penalty "was imposed under the influence of passion, prejudice or any other arbitrary factors." See, also, Gregg v. Georgia, supra, 428 U.S. at 198, 96 S.Ct. at 2937.

Such a system breaks down where, as here, the Georgia Supreme Court reviews a cold, incomplete record which does not even include the penalty phase transcript. The influence of racism in the case could not be observed by the appellate court because of the court-appointed trial attorney's overt racism, which worked to screen the effect of racism in the case as a whole.

Further, where a jury is given extremely broad discretion to impose the death penalty it becomes even more important that the jury be guided by clear standards which properly direct and limit the jury's discretion.

In the present case the jury was given an incorrect jury instruction which altogether failed to guide the jury, which must have been understood to prohibit consideration of mitigating circumstances and which opened the door to passion and prejudice influencing the capital sentencing proceeding.

As stated in Gregg v. Georgia:

> When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations. 428 U.S. at 193, 96 S.Ct. at 2934.

IV. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY WHETHER IT IS ESSENTIAL THAT THE CAPITAL JURY MUST CONSIDER MITIGATING CIRCUMSTANCES OR WHETHER IT IS SUFFICIENT THAT THE JURY NOT BE PROHIBITED FROM CONSIDERING MITIGATING CIRCUMSTANCES.

This case presents the Court with an opportunity to explicitly state whether a capital sentencing jury must consider mitigating circumstances or whether the jury simply cannot be prohibited from considering mitigating circumstances. In a number of cases the Court has stated that a capital sentencing jury must consider mitigating circumstances. See, for example, Morgan v. Illinois, supra, 60 USLW at 4545-4546; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In Eddings the Court stated:

> ...neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence...
>
> The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration. 455 U.S. at 114-115, 102 S.Ct. at 876-877.

In other circumstances the Court has stated that a capital sentencing jury cannot be precluded from considering mitigating circumstances. Lockett v. Ohio, supra, Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) and Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

Applicable Georgia law, at the time of Petitioner's trial, stated that the judge "shall include in his instructions to the jury for it to consider, any mitigating circumstances..." (O.C.G.A. § 17-10-30(b)).

Petitioner suggests that in view of the extremely broad discretion granted to Georgia juries to decide between life and death, that it is imperative that juries be clearly directed that they must consider mitigating circumstances in every case.

This is the only manner in which the rationale of Gregg v. Georgia, supra, can be effectuated. In Gregg, the Court made the following statement about how Georgia sentencing scheme was supposed to work:

> No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime:...In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g. his youth, the extent of cooperation with the police, his emotional state at the time of the crime). (Footnote omitted) As a result, while some

> jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." (Citation omitted). 428 U.S. at 197, 96 S.Ct. at 2936.

Instead of being told that there were "clear and objective standards" for their guidance, the jury in this case was told that there were "no standards" for their guidance.

Instead of being directed to consideration of mitigating circumstances this jury was told that the "only standard, if any" they would be allowed to consider was the existence of a statutory aggravating circumstance.

Instead of having its discretion suitably directed and limited, the jury in this case was told that the law "permits the whole matter of determining which penalty shall be fixed to the judgment, conscience, and absolute discretion of the jury."

In light of the jury instructions provided in the present case, this case presents an opportunity for the Court to clarify the requirement for jury instructions which clearly direct the jury to a mandatory consideration of mitigating circumstances.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: This 3rd day of August, 1992.

Respectfully submitted,

Robert Altman by MKM

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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

WILBURN DOBBS, Petitioner, v. WALTER D. ZANT, Respondent.	NO. 92 - October Term, 1992

PROOF OF SERVICE

I, MICHAEL KENNEDY MCINTYRE, hereby hereby declare, certify and attest as follows:

1. I have, pursuant to Supreme Court Rules 29.3 and 29.4, served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI and APPENDICES TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above-documents in the United States mail, properly addressed to each of them and with first class postage prepaid on this date.

2. The names and addresses of those served are as follows:

Ms. Mary Beth Westmoreland
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W,
Atlanta, Georgia 30334

3. Pursuant to Title 28, U.S.C., Section 1746, I decalre, certify and attest under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: This 3rd day of August, 1992.

Michael Kennedy McIntyre

EDITOR'S NOTE

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ORIGINAL

(3)

No. 92 92-5579

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WILBURN DOBBS,

Petitioner-Appellant,

v.

WALTER D. ZANT, Warden,

Respondent-Appellee.

APPENDICES TO:

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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APPENDIX "A"

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JAN 13 1984

JOHN H. CARTER, Clerk
By: V. Van Landingham
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

WILBURN DOBBS,

Petitioner

v.

WALTER ZANT, WARDEN
OF THE GEORGIA DIAGNOSTIC
AND CLASSIFICATION CENTER,

Respondent

CIVIL ACTION

NUMBER C80-247R

ORDER
AND MEMORANDUM

Presently before the Court is the petition for a writ of habeas corpus filed by Wilburn Dobbs. He seeks relief from his conviction in the Superior Court of Walker County, Georgia on charges of aggravated assault, armed robbery and murder. Dobbs received the sentence of death for his murder conviction. Because the charge given by the trial judge concerning the imposition of the death sentence is constitutionally deficient, the petitioner's writ of habeas corpus shall issue insofar as it vacates his death sentence, subject to the state's right to resentence him within 120 days.

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I. PROCEDURAL HISTORY

On May 20, 1974 the petitioner, Wilburn Dobbs, was brought to trial in the Walker County Superior Court on two counts of aggravated assault, two counts of armed robbery and one count of murder. On May 22, 1974 a verdict of guilty was returned by a jury on all five counts. Dobbs was then sentenced to 10-year consecutive sentences for each of the aggravated assault convictions, life imprisonment for each of the armed robbery convictions and death by electrocution for the murder conviction.

The case was appealed to the Georgia Supreme Court and the conviction and sentence were affirmed on February 24, 1976. See Dobbs v. State, 236 Ga. 427 (1976), cert. denied, 430 U.S. 975 (1977). A petition for a writ of certiorari to the United States Supreme Court was filed and was denied. See Dobbs v. Georgia, 430 U.S. 975 (1977).

On July 17, 1977 Dobbs filed a petition for a writ of habeas corpus in the Tattnall County Superior Court. An evidentiary hearing was held, and the petition was denied on October 9, 1979. See Dobbs v. Hopper, No. 77-185 (Tattnall Sup. Ct. Oct. 9, 1979). Dobbs then filed an application for a certificate of probable cause to appeal this ruling, which was denied on February 20, 1980. Next, Dobbs filed a petition for a writ of

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certiorari with the United States Supreme Court, which was denied on June 16, 1980. See Dobbs v. Hopper, _____U.S._____(1980). A petition for a rehearing was filed, and was denied on August 11, 1980.

On June 11, 1979 Dobbs had filed an extraordinary motion for a new trial in the Walker County Superior Court. An evidentiary hearing was conducted on August 12, 1979, and the extraordinary motion for a new trial was denied on August 13, 1979. See Georgia v. Dobbs, No. 8403 (Walker Sup. Ct. Aug. 13, 1979). This decision was appealed to the Georgia Supreme Court. The Supreme Court affirmed the superior court's denial of the extraordinary motion for a new trial on February 6, 1980. See Dobbs v. State, 245 Ga. 208 (1980). A petition for a writ of certiorari was filed with the United States Supreme Court on March 11, 1980, which was denied on April 21, 1980. See Dobbs v. Georgia, ___U.S. _____ (1980).

Dobbs filed his petition for a writ of habeas corpus in this Court on December 3, 1980. An evidentiary hearing was held, and the Magistrate's Report and Recommendation was filed on August 26, 1983.

By virtue of the foregoing proceedings, Dobbs has exhausted all available state court remedies. See generally 28 U.S.C. § 2254(b)(1977).

II. FACTS

Wilburn "Wiley" Dobbs, Walter Harris and Charles Burke were friends who lived in Chattanooga, Tennessee. At approximately 9:00 a.m. on December 14, 1973 Dobbs visited Harris, and the two proceeded to visit Burke at his house. Dobbs suggested to Harris and Burke that they rob someone because he needed some money. They proceeded to Roy Sizemore's Grocery Store, which was located in Chickamauga, Georgia.

Dobbs, Harris and Burke approached Sizemore's store at about 10:45 a.m. They were riding in a blue Chevrolet car owned by Dobbs and parked it in front of Sizemore's store. Dobbs and Burke went inside and asked Sizemore for directions to Travis' Car Lot. See ST at 222. [1] Sizemore gave Dobbs directions, and Dobbs, Harris and Burke drove off.

They stopped on a hill near the store. Dobbs told Harris and Burke to walk down to Sizemore's store and to distract Sizemore by asking him for a gasoline can. Dobbs would then enter the store with a shotgun and rob the store. The three walked down to Sizemore's store at about 11:00 a.m. Harris asked Sizemore for a gasoline can while Burke waited in front of the store. Dobbs entered the store with shotgun. In the store at that time were Roy Sizemore and Grace Foster, a patron of Sizemore's grocery store who lived about one-half mile from the store.

Dobbs told everyone to be quiet. Harris searched Sizemore and took his wallet. Sizemore told Dobbs and Harris that he had heart trouble and that they could have anything they wanted. Sizemore asked them not to hurt anyone. Dobbs made Sizemore go to

the back of the store and lie down. Dobbs hit Sizemore with the shotgun. A milkman, William Austin, entered the store. Dobbs shot Sizemore in the stomach and shot at the milkman. The shot missed the milkman and he dove on the floor. Dobbs and Harris then wrestled Foster to the ground, took her purse and knocked her out. Her purse contained a silver dollar, a brown tobacco sack and a pocket-knife. Dobbs, Harris and Burke left the store and drove-off in Dobbs' blue Chevrolet car.

Dobbs, Harris and Burke proceeded to see Paul Young at his used car lot. They arrived at Young's car lot at about 12:30 p.m. Dobbs owed Young approximately $100 and paid him with bills of various denominations. Dobbs, Harris and Burke stayed at Young's car lot for about one-and-one-half hours. At approximately 2:00 p.m. they went to a small store operated by Charlie Helton and purchased about $6.00 worth of goods. From Helton's store Dobbs, Harris and Burke went to "Cat's house" to gamble. See id. at 218.

Dobbs' testimony at trial differs from the foregoing version of the events. Dobbs admitted that he visited Harris on the morning of December 14, 1973. He testified, however, that he was not with Harris and Burke when the robbery was committed. Rather, he was visiting with various people on December 14, 1973 -- including two girlfriends, two male friends and his wife -- and various places -- including a car lot, a hot-dog stand, Young's car lot, a hamburger stand and a dry cleaning store.

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Dobbs' version of the events that occurred on December 15, 1973 is in accordance with other testimony. On that date Dobbs returned to Young's car lot. Dobbs told Young that the police were "trying to pin a murder on him," and he wanted Young to tell the police that he was at the car lot on December 14, 1973. Dobbs began working on some cars at Young's car lot when Officers Visage, Black and Griffin arrived. They asked Dobbs to accompany them to the Walker County Jail for questioning, and he voluntarily did so.

Visage drove Dobbs' car to the Walker County Jail, and Dobbs rode with Black in a police car. At the jail Dobbs gave Visage permission to search his car. See id. at 153. In Dobbs' car Visage found a brown tobacco sack. In the trunk of Dobbs' car Visage found a pocket-knife. At the trial Grace Foster identified these items as those which were taken from her at Sizemore's store. Dobbs was questioned at the police station for approximately three hours and was released.

Dobbs returned to Helton's store on either December 16 or 17, 1983. Dobbs asked Helton if the FBI or GBI had contacted him. Helton replied that he had not spoken to any FBI or GBI agents, and Dobbs left. See id. at 165.

On December 18, 1973 Dobbs was arrested in front of Helton's store.

(8)

Several other facts, that are not part of the description of the robbery itself or of Dobbs' pre-arrest conduct, should be set forth. The police questioned Harris about the robbery sometime before the trial, and he gave Pete Davis, a detective, permission to get the shotgun used in the robbery from his home. Davis did so. See id. at 200, 423.

During Dobbs' trial, Grace Foster and William Austin positively identified Dobbs as the triggerman at Sizemore's Store. See id. at 225, 302, 324, 338.

At the state habeas corpus hearing, Harris testified that he had lied about Dobbs' involvement in the robbery. Harris said that Dobbs did not take part in the robbery. He also stated that he was bribed and coerced by the police into framing Dobbs. See SHC at 78-87. [2/]

At the state habeas corpus hearing, the petitioner tendered the deposition of Emma Smith. In her deposition Smith stated that she was talking to Dobbs on the phone at the time the robbery occurred. See Petitioner's Exhibit No. 4. She also states that she would have testified on Dobbs' behalf at his trial had his lawyer contacted her.

In the state habeas corpus opinion, Judge Dunbar Harrison stated that the testimony of Smith, Harris and Dobbs was not credible. See Respondent's Exhibit No. 7 at 2-3.

(9)

III. THE PETITION

In his habeas corpus petition, Dobbs contends that the following errors render his conviction and sentence unconstitutiona

(1) the ineffective assistance of his trial counsel;

(2) the trial court's refusal to grant a continuance;

(3) the trial court's refusal to grant a change of venue;

(4) the introduction of evidence that was procured as a result of an illegal search of the petitioner's car and of Harris' house;

(5) the trial court's refusal to declare a mistrial after the state introduced false and highly prejudicial testimony;

(6) the trial court's refusal to grant a mistrial when a witness testified that the petitioner was involved in a prior crime;

(7) the introduction of tainted identification testimony through Grace Foster;

(8) the introduction of tainted identification testimony through William Austin;

(9) the introduction of gruesome pictures of the deceased during the trial;

(10) the introduction of hearsay testimony regarding evidence material to the state's case;

(11) the introduction into evidence of a gun which was not the same as the murder weapon;

(10)

(12) the denial of compulsory process;

(13) comments made by the district attorney during the guilt/innocence portion of the trial regarding whether the petitioner had supoenaed certain witnesses;

(14) improper remarks by the district attorney during his closing argument in the guilt/innocence portion of the trial;

(15) the trial court's failure to charge the jury on the definition of "assault";

(16) the trial court's erroneous charge, during the guilt/innocence portion of the trial, that intent may be presumed when it is the natural and necessary consequence of an act;

(17) and (18) the failure of the jury to constitute a representative cross-section of the community because all persons having conscientious or religious scruples against capital punishment were systematically excluded from the jury;

(19) the failure of the jury to reflect a representative cross-section of the community because it was biased in favor of the use of the death penalty against black persons;

(20) juror Virginia E. Mitchell was improperly excused from the jury because of her personal belief about the death penalty;

(21) the ineffective assistance of counsel during the penalty phase of the trial;

(22) the introduction of three prior convictions during the penalty phase of the trial;

(11)

(23) the trial court's erroneous sentencing charge;

(24) the trial judge's refusal to answer a juror's question during the sentencing-phase deliberations;

(25) the failure of the jury to find a capital felony as an aggravating circumstance;

(26) the conviction and imposition of a sentence by a jury which acted under the influence of passion, prejudice and other arbitrary considerations;

(27) the arbitrary and capricious infliction of the death penalty under Georgia law;

(28) the practice of the Georgia prosecuting authorities in discriminating in the imposition of capital punishment on the grounds of sex and poverty;

(29) the failure of the indictment to allege any aggravating circumstances;

(30) the failure of the Georgia Supreme Court to properly review the sentence imposed by the trial court;

(31) the failure of the trial court clerk to send the entire record and transcript of the trial court proceedings to the Georgia Supreme Court;

(33) the failure of the Georgia Supreme Court to include an entire transcript of the trial for further review; 3/

(34) the ineffective assistance of counsel on appeal;

(35) the constitutionally deficient process of direct appellate review of death sentences in Georgia;

(36) the intentional and systematic exclusion of blacks, women, young people between the ages of 18 and 30 and poor people from the grand jury venire;

(37) the intentional and systematic exclusion of blacks, women, young people between the ages of 18 and 30 and poor people from the traverse jury venire;

(38) the failure of the state of Georgia to pay for the costs necessary to pursue a habeas corpus petition;

(39) the imposition of the death sentence by a jury which did not believe that the petitioner would be executed;

(40) the refusal of the trial court to compel the petitioner's presence during the extraordinary motion for a new trial hearing;

(41) the refusal of the trial court to grant a new trial based on newly discovered evidence; and

(42) the withholding by the state of exculpatory evidence during the trial.

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IV. INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE WALKER COUNTY TRIAL.

In Counts one and 21 of his petition for habeas corpus relief, Dobbs contends that his trial counsel, Mr. Bennett, provided constitutionally ineffective assistance during both the guilt/innocence and sentencing phases of his trial. In evaluating his contention, the Court will 1) set forth the standard for reviewing such claims, 2) review Bennett's conduct in preparing and presenting Dobbs' case during the guilt/innocence portion of the trial, 3) determine whether Bennett rendered effective assistance during this portion of the trial, 4) review Bennett's conduct in preparing and presenting Dobbs' case during the sentencing phase of the trial, and 5) determine whether Bennett rendered effective assistance during this portion of the trial.

A. THE STANDARD

Under the sixth amendment a criminal defendant is guaranteed "effective assistance of counsel, that is, counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Francis v. Spraggins, slip op. at 661 (quoting Washington v. Strickland, 693 F.2d 1243, 1250 (5th Cir. 1982)(Unit B)(en banc), cert. granted ____U.S._____, 103 S. Ct. 2451 (1983)). To prevail on an ineffective assistance of counsel claim, a petitioner

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must prove, by a preponderance of the evidence, that he did not receive reasonably effective assistance from his counsel. See Francis, supra. 4/ Additionally, a petitioner must "show that his counsel's ineffectiveness resulted in actual and substantial disadvantage to the course of his defense, but need not show that this disadvantage determined the outcome of the entire case." Washington, supra, at 1262. If this showing is made, a writ of habeas corpus must be granted unless the state proves that counsel's ineffectiveness was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 20-26 (1967); Washington, supra, at 1258. And although there is a presumption of attorney competence, "[t]his presumption can be rebutted . . . when certain of counsel's actions do not conform to a general pattern of a rational trial strategy.'" Id. at 1257-58. 5/

The court in Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982)(Unit B)(en banc), cert. granted, _____U.S. _____, 103 S. Ct. 2451 (1983), outlined general standards for evaluating an ineffective assistance of counsel claim in the context of allegedly inadequate pre-trial investigation. Because the focus of the ineffective assistance of counsel claim in this case relates to Bennett's investigation of both the guilt/innocence and sentencing phases of Dobbs' trial, a review of these standards is useful.

In Washington the court first noted that the failure of an attorney to conduct a reasonably substantial investigation into a defendant's one plausible line of defense almost always will result in a finding of ineffective assistance of counsel, whereas an attorney who conducts such an investigation will usually render constitutionally effective assistance. Further, the court stated that when more than one plausible line of defense may serve a defendant's interests, counsel should conduct a reasonably substantial investigation into each of these defenses to determine which of these defenses will best serve the defendant. After such an investigation, if a strategic choice is made regarding which defense to present at trial, "courts will . . . find ineffective assistance of counsel only if the choice was so patently unreasonable that no competent attorney would have made it." Id. at 1254. The court also noted that, generally, "an attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is [constitutionally] effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of those assumptions are reasonable." Id. at 1256. Finally, the court stated that when counsel fails to conduct a substantial investigation into plausible lines of defense for reasons other than strategic choice -- i.e., counsel "abandon[s] his obligation to develop a case for his client" -- a finding of ineffective assistance of counsel usually will result. 6/

B. BENNETT'S QUALIFICATIONS AND HIS CONDUCT IN PREPARING AND PRESENTING DOBBS' CASE DURING THE GUILT/INNOCENCE PHASE OF THE TRIAL

1. Qualifications

Before he represented Dobbs, Bennett had practiced law for over 10 years and had participated in over 100 capital cases. The Dobbs case was, however, the first case handled by Bennett under Geogia's bifurcated capital-trial procedure. 7/ The composition of Bennett's law practice varied, but it consisted of approximately 50% criminal work at the time he represented Dobbs.

2. Pre-trial Confusion

Pre-trial confusion existed regarding whether Bennett would represent Dobbs. An attorney named Burton Brown was initially appointed to represent Dobbs, and Bennett was to assist Brown, as Brown had little experience in criminal law. Sometime in early 1974 it was agreed, however, that Bennett would represent Dobbs, either on a court-appointed basis or as employed counsel. Accordingly, Bennett represented Dobbs at the preliminary hearing held on January 29, 1974. On the day of arraignment -- two days before trial -- Bennett also represented Dobbs. Dobbs stated to the court, however, that he had employed an attorney named Sullivan to represent him at trial. Sullivan did not appear on Dobbs' behalf at trial, and Bennett represented Dobbs during both the guilt/innocence and sentencing phases of his trial.

3. The Dobbs-Bennett Relationship

As confusion characterized the question of who would represent Dobbs at trial, uncooperativeness characterized Dobbs' attitude toward Bennett prior to the trial. Dobbs refused to discuss possible defenses with Bennett and he gave Bennett the name of only one potential witness -- his sister. See SHC at 54, 56-57; ST. at 2-11. According to Dobbs, however, his sister was to supply Bennett with the names of potential defense witnesses. Bennett contacted Dobbs' sister, but she did not know of any potential witnesses and was uncooperative. See SHC at 52; ST. at 4.

4. Other Investigative Efforts

In addition to contacting Dobbs' sister, Bennett performed the following pre-trial investigation: 1) Bennett contacted Dobbs' mother, who was incarcerated at the time; she was not helpful, see FHC at 63, 8/ 2) Bennett interviewed all the witnessses listed on Dobbs' arrest warrant, and 3) Bennett examined the main prosecution witness at the preliminary hearing. See SHC at 53, 56, 58.

5. The Pre-trial Conference

At a pre-trial conference held on the day the trial began, Bennett raised several motions. He moved for a change of venue based on pre-trial publicity, challenged the constitutionality of the entire proceeding based on Furman v.

Georgia, 408 U.S. 238 (1972), attempted to determine whether two witnesses -- Harris and Burke -- were given lenient sentences in exchange for their testimony and objected to the death-qualification of jurors. All these motions were denied.

During the pre-trial conference, Bennett also aired the problem of Dobbs' uncooperativeness. See ST. at 1-11. The court discussed the problem with Dobbs. He admitted that the problem existed and inferred that it was due to Bennett's lack of interest in his case. See ST. at 4-5. Dobbs also told the judge that he had "some witnesses who were on their way." Id. at 7. Bennett moved for a continuance to interview these witnesses, but his motion was denied.

6. Witnesses Divulged During the Trial

During the course of the trial, Dobbs informed Bennett of several possible witnesses, including a polygraph examiner, James Wood, Sue Bloodworth and Mack Robinson. See id. at 66-68, 143-44. Three of these witnesses -- Wood, Robinson and the polygraph examiner -- were interviewed by Bennett during the trial. They were never called to testify because Bennett determined that the witness' testimony was either incriminating or irrelevant. Dobbs' concurred in the decision not to call these witnesses. See id. at 66-68, 241, 329, 372; FHC at 64. Whether Bloodworth was interviewed by Bennett is unclear from the record.

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7. Bennett's Conduct During the Trial

During the trial Bennett conducted several effective cross-examinations and raised sensible objections. See ST at 80, 81, 82, 97-100 (cross-examination of Strickland, a roadworker), 106, 108-113 (cross-examination of Whitten, a roadworker), 119-122 (cross-examination of Howell, a meter reader), 126, 127-133 (cross-examination of Maynor, a passer-by), 152, 153-62 (cross-examination of Young, a used-car salesman), 164, 194, 197, 213-15 (motion for mistrial after comment about another crime), 311 (impeachment with preliminary hearing materials), 330-37 (cross-examination regarding identification procedure), 340-42 (introduction of photographs), 337-58 (Yates testimony), 368, 382,385, 389-90, 398-406 (allegation of prosecutorial misconduct). Bennett, however, failed to object to certain prejudicial testimony. See id. at 203, 279-83 (discussion of Foster's injuries), 469-80 (collateral matters).

8. King and Weidner

Two cases recently decided by the Court of Appeals for the Eleventh Circuit -- King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), and Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983) -- shed light on whether Bennett rendered

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effective assistance during the guilt/innocence portion of Dobbs' trial. In King the court found the petitioner's counsel to have rendered effective assistance during the guilt/innocence portion of the petitioner's trial notwithstanding the fact that counsel was admittedly not prepared, failed to effectively cross-examine a key witness and failed to introduce a piece of exculpatory evidence. In reaching its conclusion, the court relied on the fact that counsel deposed all key government witnesses and consulted his client four or five times. Compare Wiley v. Wainwright, 709 F.2d 1412, 1413 (11th Cir. 1983) (counsel rendered ineffective assistance by conferring with his client only three times, inadequately investigating the case and coercing the petitioner into pleading guilty)(dicta). 9/

In Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983), the court held that counsel rendered ineffective assistance during the guilt/innocence phase of a murder case when he did not hire an investigator, may have gone to the scene of the shooting but failed to interview potential witnesses, did not depose a key witness (a medical examiner), failed to obtain a crucial piece of evidence (an autopsy report) and relied on an implausible defense (excusable homocide). See id. at 616-17. 10/

9. Effective Assistance of Counsel?

In light of King and Weidner, the Court concludes that Bennett rendered effective assistance during the guilt/innocence phase of the trial. Bennett interviewed all key prosecution witnesses and effectively cross-examined them. Furthermore, he interviewed the potential defense witnesses that Dobbs told him about, including Wood, Robinson, the polygraph examiner and Dobbs' sister, and made a reasonable choice in not calling these individuals as witnesses. Bennett did not thoroughly investigate possible defenses. See SHC at 56; FHC at 79-81, 86. One reason for this occurrence, however, was Dobbs' total lack of cooperation with Bennett. Although more thorough investigation would have been preferable, this Court cannot hold that Bennett rendered ineffective assistance of counsel during the guilt/innocence phase of the trial in light of Dobbs' reticence and Bennett's other efforts.

C. THE SENTENCING PHASE.

1. Douglas, Stanley and Adams

Regarding whether Bennett rendered effective assistance during the sentencing phase of Dobbs trial, three cases recently decided by the Court of Appeals for the Eleventh

Circuit are instructive. In Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), the petitioner contended that "he was deprived of the effective assistance of counsel at the penalty phase of [his] trial due to trial counsel's failure to consult with [him] and other potential witnesses prior to the penalty phase and to investigate and present evidence which might have been considered mitigating." Id. at 1553. The facts in Douglas demonstrated that the petitioner's counsel had not conducted an investigation into the existence of mitigating evidence before the sentencing proceeding began. Id. at 1555. Furthermore, counsel had not discussed with the petitioner the possibility of the petitioner testifying on his own behalf before the sentencing phase of the trial. Counsel did, however, discuss with the petitioner during the sentencing phase of the trial whether the petitioner should testify on his own behalf. The facts also showed that counsel's lack of preparation for the sentencing phase of the trial was due to his unfamiliarity with a bifurcated capital-trial procedure. See id.

The Douglas court held that counsel did not render reasonably effective assistance during the penalty phase of the petitioner's trial because counsel simply had done nothing to prepare for this portion of the trial. Id. at 1556. The court also noted that although the petitioner "had not suggested to counsel any witnesses who could have been called to testify [on

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his behalf during the sentencing phase of the trial], counsel had discussed the need for such [evidence], if at all, only 'briefly' [with the petitioner] between the guilt and sentencing phases of the trial." Id. 11/

In Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), the court held that counsel rendered reasonably effective assistance during the sentencing phase of a capital trial, notwithstanding the fact that he failed to produce easily available mitigating evidence in the form of character witnesses for the petitioner. The court first noted that, under Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B)(en banc), cert. granted, ____U.S. _____, 103 S. Ct. 2451 (1983), counsel do not have an absolute duty to investigate mitigating evidence. It stated, however, that "a showing that counsel's decision to forego [such] evidence was not based on a reasoned tactical judgment will give rise to an ineffective assistance claim." Id. at 966. Next, the court observed that the petitioner's trial counsel discussed the possibility of a character witness defense with the petitioner and his mother. The Court then held that counsel's assistance was effective because he had explored the possibility of presenting character witnesses and made a reasonable strategic decision to not introduce this testimony.

Finally, in Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), the court addressed the issue whether counsel's

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decision to make a plea for mercy at the sentencing phase of a capital trial was a reasonable tactical decision. The record in Adams indicated that the petitioner's counsel had made a reasonable investigation of possible mitigating evidence -- he "had interviewed [the petitioner's] wife, neighbors and former employers. . . . " -- and that the petitioner's wife was thoroughly familiar with the petitioner's background. Id. at 1446. Also, the record demonstrated that the prosecution could have introduced damaging evidence had the petitioner's background been injected into the penalty phase of the trial. Id. at 1447. In light of this evidence, the court held that counsel's decision to plead for mercy was a reasonable tactical decision. Id.

2. Bennett's Conduct In Preparing and Presenting Dobbs' Case During the Sentencing Phase of the Trial

In investigating the sentencing phase of Dobbs' trial Bennett performed the following interviews. Bennett first talked to Dobbs, although Dobbs denies that this interview took place. See SHC at 109-10. Bennett stressed the importance of the sentencing phase of the trial to Dobbs and asked about the existence of mitigating evidence, e.g. character witnesses. Dobbs refused to talk to Bennett about such evidence, although he did tell Bennett that his sister could supply the names of

potential witnesses. See SHC at 59-60, 63; FHC at 62-66. Bennett interviewed his sister. She was uncooperative and did not give him the names of potential character witnesses. See SHC at 52. Next, Bennett interviewed Dobbs' mother, who was serving a life sentence in the penitentiary. She was also an unavailing source of information. See FHC at 63. Finally Bennett talked to several members of Dobbs' community and several police officers, none of whom who testify as character witnesses for Dobbs. See SHC at 62; FHC at 64-65.

In addition to conducting these interviews, Bennett knew, from his general knowledge about the Dobbs family, that 1) the petitioner had a poor reputation in his community, and 2) that he was "separated from his wife and not supporting his family." SHC at 64; see id. at 62.

Based on his interviews and his general knowledge about Dobbs, Bennett decided not to present mitigating evidence during the sentencing phase of Dobbs' trial. He felt that the jury would not find this evidence -- which consisted of character testimony from Dobbs' mother and sister -- to be persuasive. See FHC at 64, 67-69, 75. [12/] Rather, Bennett decided to argue that the Sizemore killing was impulsive and that the imposition of the death penalty therefore was not warranted.

Bennett's investigation failed to discover several character witnesses who, at the time of the state habeas hearing, stated that they would have testified on Dobbs' behalf. See Affidavits of Knowles, Winston, Strickland, Foster, Tramble, Porter, McDaniel, Pasley.

3. Effective Assistance of Counsel?

Given these facts, the Court concludes that Bennett rendered effective assistance during the sentencing phase of Dobbs' trial. Although Bennett was unable to discover a bevy of character witnesses who apparently would have testified on Dobbs' behalf, he did perform a reasonably substantial investigation. See Stephens v. Zant, slip op. at 1006 (11th Cir. Dec. 9, 1983)(affidavits of family members and childhood acquaintances indicating that they would have testified on the petitioner's behalf during the sentencing phase of his trial, who were not interviewed by trial counsel, do not alone establish ineffectiveness of counsel). The reticence of Dobbs and his family members obviously impeded Bennett's investigative efforts. Further, Bennett made a reasonable tactical decision not to present mitigating evidence based on the information before him. See McNeal v. Wainwright,

slip op. at 1054 (11th Cir. Jan. 3, 1984)(counsel will not be deemed constitutionally deficient because of reasonable tactical decisions). Thus, the Court holds that Bennett rendered effective assistance during both the guilt/innocence and sentencing phases of Dobbs' trial.

V. THE MOTION FOR A CONTINUANCE

In Count Two of his petition, Dobbs contends that the denial of his motion for a continuance was error of constitutional proportions. The motion for a continuance was made by Bennett during a pre-trial conference in the trial judge's chambers. Dobbs was present. In making the motion, Bennett first told the Court that Dobbs had failed to supply him with the names of potential defense witnesses. He then requested that Dobbs state to the court "whether . . . he has [any] witnsses, and if he intends to supply me with the witnesses' [names] and enable me to contact them and interview them. . . ." ST. at 6-7. Dobbs stated that his witnesses were "on their way down." Id. at 7. Bennett then asked for a continuance to interview these witnesses.

The trial judge then noted that 1) the prosecution's case would last several days (thus enabling Bennett to interview these witnesses), 2) the appearance of the witnesses was not assured because they lived without the subpoena power of the court, and 3) the relevancy of their testmony was not established. See id. at 10. The trial judge therefore denied the motion for a continuance.

The denial of a motion for a continuance will not lead to habeas corpus relief unless it is so "arbitrary and fundamentally unfair that it violates constitutional principles of due process."

Hicks v. Wainwright, 633 F.2d 1146, 1148 (5th Cir. 1981)(Unit B). In this case the denial of the motion for a continuance was not fundamentally unfair. The motion was made to enable Bennett to interview witnesses Dobbs solicited. Bennett was able to do so before the prosecution rested its case. See id. at 66-68, 241, 329, 372; FHC at 64. Also, a continuance was not needed to enable Bennett to otherwise prepare the case. Before the trial began Bennett had interviewed every key prosecution witness and was familiar with the case.

VI. CHANGE OF VENUE

In Count Three of his petition, Dobbs contends that the trial court's denial of a motion for the change of venue deprived him of his due process right "to be tried by 'a panel of impartial, indifferent jurors.'" Irvin v. Dowd, 366 U.S. 717, 722 (1961). Dobbs bases this contention of the fact that there was "extensive press coverage and publicity" attending his trial. Petition at 4.

The standard to be applied to an allegation of prejudicial pre-trial publicity is outlined in Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983):

When prejudicial pretrial publicity or an inflamed community atmosphere preclude seating an impartial jury, due process requires the trial court to grant a defendant's motion for a change of venue, or a continuance. Ultimately, the question is whether a defendant's "trial was not fundamentally fair." Two standards guide analysis of this question. They are the "actual prejudice" standard and the "presumed prejudice" standard.

To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. Second, these jurors, it must be determined, could not have laid aside these preformed opinions and "render[ed] a verdict based on the evidence presented in court."

Prejudice is presumed from pre-trial publicity when (1) pretrial publicity is sufficiently prejudicial and inflammatory, and (2) the prejudicial pretrial publicity saturated the community where the trial was held. As the Fifth Circuit has described the test, "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from the community, '[jury] prejudice is presumed and there is no further duty to establish bias.'"

> [The] petitioner has the burden to show "essential unfairness" under either standard. The petitioner [thus] must "show that setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice."

Id. at 544 (citations omitted); see also United States v. Capo, 595 F.2d 1086, 1090 (5th Cir. 1979), cert. denied, 444 U.S. 1012 (1980).

Under the evidence produced in the record, neither of the two prongs of the test outlined in Coleman are met. Although the record suggests that some publicity attended Dobbs' state court trial, see ST at 12, 15-16, 316, 320; Respondent's Exhibit No. 4 at 6; SHC at 68, 71; Petitioner's Exhibit No. 3 at 43, this publicity is not so extensive that it can be considered to have "pervaded the community." Also, although several jurors had heard about Sizemore's murder and the arrest of the petitioner, no prospective juror had any detailed knowledge about the incident. Moreover, no potential juror who had heard about the Sizemore incident indicated that this information would affect his ability to render an impartial verdict. See Respondent's Exhibit No. 3 at 10-13, 21, 23, 32-35, 49, 55-58, 69. Finally, the state trial court gave several curative instructions regarding the publicity associated with the Dobbs trial. See, e.g., ST at 326. The petitioner's allegation that the denial of the motion for a change of venue deprived him of his due process right to a fair trial therefore is without merit. 13/

VII. THE SEARCH AND SEIZURE ISSUES

In Count Four of his petition, Dobbs contends that 1) the brown tobacco sack and the pocket knife taken from his car by Officer Visage while he was being questioned at the Walker County jail, and 2) the shotgun taken from Walter Harris' house by Officer Davis were illegally seized by these police officers. Thus, these items were improperly admitted into evidence and constitute grounds for habeas corpus relief.

These contentions are without merit for two reasons. First, Dobbs failed to object to the manner in which these items were seized at trial, thereby barring such objections in this proceeding. See Stone v. Powell, 428 U.S. 465, 494 (1976); Magistrate's Report and Recommendation at 21-23. Second, the contentions are without substantive merit because Dobbs consented to the search of his car and he has no standing to challenge the seizure of the shotgun. See generally United States v. Knotts, _____U.S. _____ (1983); United States v. Mendenhall, 446 U.S. 544, 557 (1980); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968); United States v. Alegria, slip op. at 920 (11th Cir. Dec. 19, 1983); United States v. Pitt, 717 F.2d 1334, 1336-38 (11th Cir. 1983).

VIII. ADMISSION OF YATES TESTIMONY

Count Five of Dobbs' petition concerns the admission of Daisy Yates' testimony. Yates, who is Foster's daughter, testifed

that she saw Dobbs lurking near her mother's hospital room on December 15, 1973, the day after the Sizemore killing. Yates did not know exactly what time Dobbs appeared, although it was early or mid-afternoon. See ST. at 355.

Dobbs contends that the admission of this testimony constitutes constitutional error for two reasons. First, it is highly prejudicial: it implies that Dobbs was attempting to kill Foster at the hospital. Second, by introducing the Yates' testimony the prosecutor committed a Brady violation because he knew, in light of Officer Visage's testimony, that Yates' testimony was false. See generally Brady v. Maryland, 373 U.S. 83 (1963). Regarding Dobbs' first argument -- that the admission of Yates' testimony was so prejudicial as to constitute constitutional error -- it is well settled that the admission or exclusion of evidence by a trial court constitutes constitutional error only if it deprives the petitioner of fundamental fairness. See Jameson v. Wainwright, slip op. at 535 (11th Cir. Nov 17, 1983). [14/] To deny a petitioner fundamental fairness, allegedly wrongfully admitted testimony must be "material in the sense of a crucial, critical, highly significant factor." Osborne v. Wainwright, slip op. at 687 (11th Cir. Dec. 5, 1983).

The Court holds that the introduction of Yates' testimony did not deprive Dobbs of fundamental fairness for four reasons. First, the issue of Dobbs' location on December 15, 1973 is not

a critical factor in this case. Compare Hutchins v. Wainwright, 715 F.2d 512, 517 (11th Cir. 1983). Second, the other evidence of Dobbs' guilt is overwhelming. [15/] Third, Yates' testimony was properly admissible because it is not necessarily inconsistent with Visage's testimony. Officer Visage testified at trial that he learned that Dobbs was at Young's car lot at approximately 2:15 p.m. on December 15, 1973. See ST. at 395-96. Visage went to the car lot and saw Dobbs there at about 2:30 p.m. See id. at 377. Visage then took Dobbs to the Walker County Jail for questioning. Yates testified that she saw Dobbs at the hospital in the early or mid-afternoon on December 15, 1973. Thus, Dobbs could have been both at the hospital and at Young's car lot on December 15, 1983. Finally, although Yates' testimony was prejudicial, its prejudicial effect was reduced because Bennett emphasized the discrepancy between Yates and Visage's testimony to the jury. See ST. at 355-56, 396-98, 402-05.

Dobbs' second contention -- that the prosecutor committed a Brady violation by introducing Yates' testimony -- is also meritless. To establish a Brady violation, it must be shown that the prosecutor introduced testimony which he knew or should have known was false, and that the jury was not made aware of evidence which contradicted the false testimony. See generally Ross v. Hopper, 716 F.2d 1528, 1533-34 (11th Cir. 1983); United States v. Fontenot, 628 F.2d 921, 924 (5th Cir. 1980), cert. denied, 452 U.S. 921 (1981). In this case there is no reason the prosecutor knew or should have known Yates' testimony was false because it

was not necessarily inconsistent with Visage's testimony. Furthermore, the jury was made aware of the possible inconsistency between the testimony of Yates and Visage by Bennett.

IX. ADMISSION OF PRIOR CRIME

In Count six of his petition, Dobbs argues that his constitutional right to a fair trial was denied "when the jury heard Walter Harris testify as to a prior crime in which the Petitioner was alleged to have been involved." Petition at 5. The comment Dobbs refers to came in response to a question asked by Bennett on cross-examination regarding a car Dobbs owned:

> Q: Well, did the red car have anything to do with this [i.e. Sizemore's] holdup.
>
> A: No, sir, but it had something to do with Mr. Lomenick's holdup.

See ST. at 212. After this comment, Bennett moved for a mistrial. The trial judge denied this motion, but offered to give a curative instruction to the jury. Bennett declined this offer because the testimony "was stopped before [the jury] got into it far enough." Id. at 213.

Harris' comment constitutes constitutional error only if it rendered Dobbs' trial fundamentally unfair. The comment did not render the trial fundamentally unfair for two reasons. First, the comment was not unduly prejudicial because it implicated only Dobbs' car in the Lomenick holdup, not Dobbs himself. Indeed, Bennett apparently felt that the prejudice resulting from the comment did not even warrant a curative instruction. Second, the other evidence of Dobbs' guilt is overwhelming. [17/]

X. THE IDENTIFICATION TESTIMONY

In Counts Seven and Eight of his petition, Dobbs argues that the identification of him by Foster and Austin during his trial was tainted by impermissibly suggestive pre-trial identification procedures, and that the admission of these identifications therefore violated his constitutional right to a fair trial.

An in-court identification violates a petitioner's constitutional right to a fair trial when 1) pre-trial identification procedures are unnecessarily suggestive and 2) the totality of the circumstances indicates that the at-trial identification is not reliable. See Manson v. Brathwaite, 432 U.S. 98, 104 (1977); United States v. Thevis, 665 F.2d 616, 643 (5th Cir. 1982); United States v Rice, 652 F.2d 521, 524, 528 (5th Cir. 1981). The factors to be considered in determining reliability include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation." Manson, supra, at 114. A court must balance the suggestiveness of the identification against its reliability to determine the admissibility of the identification at trial. See Manson, supra at 114 (citing Neil v. Biggers, 409 U.S. 188 (1972)).

The pre-trial identification procedures used by the police in this case were impermissibly suggestive. Austin was shown approximately 12 photographs. Of these photographs, four were pictures of Dobbs and two were of white males. See ST. at 309-315, 330-37. Foster was also given approximately 12 photographs to look through, and 4 or 5 were pictures of Dobbs. See Petitioner's Exhibit No. 3 at 30-32.

Although the pre-trial identification procedures were impermissibly suggestive, both Foster and Austin had an adequate independent basis to identify Dobbs. Both were eyewitnesses to the robbery and murder and both were extremely positive in their identifications of Dobbs. See ST. at 225, 271, 302, 322, 338-39; see generally McKinon v. Wainwright, 705 F.2d 419, 422-23 (11th Cir. 1983); ST. at 220-278, 299-339. Thus, although the pre-trial identification procedures were suggestive, the totality of the circumstances indicates that the reliability of the in-court identification of Dobbs by Foster and Austin is high. The Court therefore concludes that there was not a very substantial likelihood of irreparable misidentification resulting from the pre-trial identification procedures, see Corn v. Zant, 708 F.2d 549-566-67 (11th Cir. 1983); Neil v. Biggers, 409 U.S. 188, 199-200 (1972), and holds that Dobbs' constitutional rights were not violated by the identification testimony admitted at trial. [18]/

XI. ADMISSION OF GRUESOME PHOTOGRAPHS

In Count Nine of his petition, Dobbs contends that the admission of gruesome photographs of the deceased deprived him of his constitutional right to a fair trial. These photographs, State's Exhibit No. 27 and 29, depict Sizemore's gunshot wound and his head injury. See ST. at 341-43. Under Georgia law "photographs which are relevant and material to issues in the case are not excludable on the grounds that they would inflame the minds of the jurors, nor are they excludable on the ground that they are corroborative or cumulative of other evidence." Cape v. State, 246 Ga. 520, 522 (1980), cert. denied, 449 U.S. 1134 (1981). The photographs at issue were relevant to the manner in which Sizemore was wounded and subsequently killed. They therefore were properly admitted by the trial judge and do not provide grounds for habeas corpus relief. Accord Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983), cert. denied, _____U.S. _____, 103 S. Ct. 3544 (1983).

Even if the photographs were improperly admitted, the petitioner would have to show that their admission denied him "fundamental fairness" in order to be granted habeas corpus relief. See Osborne v. Wainwright, slip op. at 687 (11th Cir. Dec. 5, 1983). To deny a petitioner "fundamental fairness," allegedly prejudicial evidence must be "material in the sense of a crucial, critical, highly significant factor." Id. The photographs in question are not material in this sense in view of the other evidence of Dobbs' guilt on the charge of murder. 19/

XII. ADMISSION OF HEARSAY TESTIMONY

In Count 10 of his petition, Dobbs argues that his constitutional right to a fair trial was violated when certain hearsay testimony was admitted. The testimony at issue was given by Paul Young, the owner of the car lot that Dobbs visited after the Sizemore incident. Young stated that Dobbs owed him some money, approximately $100, and that on the afternoon of December 14, 1973 -- the day of the Sizemore robbery -- Dobbs paid off this debt by handing Young a fifty dollar bill and bills of other denominations. See ST. at 148. This testimony was potentially incriminating because a fifty-dollar bill was taken from Sizemore during the robbery. See id. at 79. On cross-examination, it was revealed that Young's statement was hearsay because Dobbs paid the $100 to Young's wife. See id. at 154-55.

The admission of this testimony warrants habeas corpus relief only if it rendered Dobbs' trial fundamentally unfair. See Jameson, supra. It did not do so because 1) the denomination of the bills constituting the $100 was not a critical factor in the state's case, 2) the prejudice resulting from the hearsay statement was effectively negated by Bennett's cross-examination of Young, and 3) the other evidence of Dobbs' guilt is overwhelming. [20/] See Shaw v. Boney, 695 F.2d 528, 531 (11th Cir. 1983)(admission of double-hearsay threat did not lead to a fundamentally unfair trial because the statement was "neither critical nor even a highly significant factor in the prosecution's case" and the evidence of guilt was overwhelming).

XIII. ADMISSION OF THE SHOTGUN

In Count 11 of the petition, Dobbs argues that his constitutional rights were violated by the "introduction into evidence of a gun which was not the same as the murder weapon." Petition at 7. As noted earlier, an evidentiary ruling warrants habeas corpus relief only if it is erroneous and deprives the defendant of fundamental fairness. See Jameson, supra.

"To constitute a denial of fundamental fairness, the evidence erroneously admitted must be material in the sense of a crucial, critical, highly significant factor." Id.

The shotgun was properly admitted into evidence because four witnesses -- Harris, Foster, Visage and Davis -- identified the shotgun as the one used by Dobbs. See Duvall v. State, 238 Ga. 325, 326 (1977); ST. at 199-299, 264-67, 386, 407-08, 410-12, 423-24. Furthermore, the shotgun was not a crucial piece of evidence in this case. Accordingly, the admission of the shotgun did not deny the petitioner fundamental fairness.

XIV. THE RIGHT TO COMPULSORY PROCESS

In Count 12 of his petition, Dobbs argues that his right to compulsory process was violated when he "sought to have crucial witnesses subpoenaed to his trial, but was unable to do so because some of those witnesses resided in . . . Tennessee." Petition at 8. This contention is without merit because the right to compulsory process extends only to witnesses whose attendance may be compelled by a court. See United States v. Greco, 298 F.2d 247, 251 (2d Cir.), cert.

deneid 369 U.S. 820 (1962). The witnesses Dobbs allegedly sought to subpoena all lived in Tennessee. 21/ They were beyond the subpoena power of the Walker County Superior Court because, at the time of Dobbs' trial, Georgia had not enacted the Uniform Act to Secure the Attendance of Witnesses from Without the State. See O.C.G.A. § 24-10-90 to -97 (Michie 1981), which allows Georgia judges to apply for a court order from judges in other Uniform Act states to compel the attendance of a witness. 22/ Dobbs' constitutional right to compulsory process therefore was not violated.

XV. THE PROSECUTOR'S CONDUCT DURING THE GUILT/INNOCENCE PHASE OF THE TRIAL

Dobbs argues that the prosecutor's conduct during the guilt/innocence phase of the trial deprived him of a constitutionally fair trial. Specifically, Dobbs contends that 1) the questions asked by the prosecutor during Dobbs' cross-examination regarding whether Dobbs had subpoenaed certain witnesses (Count 13) and 2) the prosecutor's remarks during his closing argument (Count 14) were so prejudicial that they violated his constitutional rights.

To prevail on a claim of prosecutorial misconduct during the guilt/innocence phase of a capital trial, a petitioner must show that the prosecutor's actions were so egregious as to render the trial fundamentally unfair. See Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974); Hance v. Zant, 696 F.2d 940, 950 (11th Cir. 1983), cert denied, _____U.S. _____, 103 S. Ct. 3544 (1983). In making this determination the totality of the circumstances should be considered, i.e. the prosecutor's conduct should be considered in the context of the entire trial. Id. A court should, however, focus on the following consideration (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks are isolated or extensive; (3) whether the remarks were deliberately or accidentally placed before the jury; and, except in the sentencing phase of capital murder trials, (4) the strength of the competent proof to establish the guilt of the accused. See id. at 950 n. 7. The prosecutorial misconduct standard for the guilt/innocence phase of a capital trial is exacting. See Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983)(a finding that "the prosecutor's remarks were undesirable or even universally condemned" does not meet the standard); id. (prosecutorial misconduct is "not to be found in any but egregious cases"). 23/

During the trial, the prosecutor conducted the following cross-examination of Dobbs regarding the availability of one witness:

Q Now, you know where James Woods Garage is on Salem Road?

A Yes, sir, I do.

Q And do you remember going there with [a] shotgun?

A No, sir.

Q Do you remember sawing it off there?

A No, sir.

Q In fact, you had him subpoenaed as a witness, didn't you?

A Yes, sir, I did.

Q And suddenly you decided you didn't need him, didn't you?

A It wasn't my decision, its my lawyer's decision, it was ours together after we got through talking.

Q Did that sawing off of that shotgun have anything to do with you deciding you didn't need him?

A No, sir.

ST. at 475-76.

(45)

After the prosecutor finished cross-examining Dobbs, Bennett asked Dobbs the following questions on re-direct examination:

Q Your witness that you subpoenaed, Woods was here this morning, wasn't he?

A Yes, sir, I believe he was.

Q And we talked to him didn't we?

A Yes, sir.

Q And what did he tell us that caused us to send him on back?

A That he didn't see my car that day.

Q And why did you subpoena him?

A Because I thought he had seen it.

MR. BENNETT: Come down.

Id. at 480.

The prosecutor also made the following remarks during his closing argument.

> Then, when you get to Dobbs, boy, he was all over the country that day. Now with his wife, his wife ain't here, she's working. She lives in Georgia. Don't you know a subpoena would have gotten her? Don't you know his lawyer who has been his lawyer since the preliminary hearing knows about subpoenas?
>
> . . .

(46)

Then I asked him about one witness, this fellow Woods, about sawing off that shotgun and so forth and so on.

But he had him subpoenaed up here but didn't use him because he didn't see him in his car that day, in his car that day, when all the way through here he was telling you he was in Harris' car with that gold scoop on it.

A man who would do what has been done here would not hesitate, or don't you think under this evidence, to tell you a story to save his own hide.

. . .

I don't know. I could stand up here and talk a long time, but I do say this, there's people that it just ain't safe to have on your streets, and there is people that ain't safe to have around you, and there's people that it ain't safe, your property ain't, your life ain't, and if this evidence hasn't demonstrated such a case, study about it.

Of course, if you find that he didn't do it, or if you have a reasonable doubt, then you can acquit him.

When you do that, he'll walk out the door with everybody else.

Can you afford to take a chance?

That's this case, gentlemen of the jury, that's this evidence, take it and weigh it and weigh it well, and the State respectfully insists that under this evidence a verdict of guilty is demanded.

Respondent's Exhibit No. 3 at 13-16.

The Court holds that the prosecutor's cross-examination of Dobbs and his closing remarks did not render the guilt/innocence phase of Dobbs' trial fundamentally unfair for several reasons. First, the state in this case had overwhelming proof to establish Dobbs' guilt. See Darden v. Wainwright, 699 F.2d 1031, 1033-37 (11th Cir. 1983)(prosecutor's closing remarks during guilt/innocence phase of a capital trial -- during which he called the defendant an "animal," and expressed his personal opinion regarding the defendant and made "tasteless and unprofessional" remarks -- did not render the trial fundamentally unfair in light of invitation contained in defense counsel's initial summation, the fact that defense had the "last word" through Florida's rebuttal procedure and the overwhelming evidence of the defendant's guilt); Hance v. Zant, 696 F.2d 940, 950-53 (11th Cir. 1983) (prosecutor, during guilt/innocence phase of a capital trial, introduced numerous gruesome photographs, fragments of corpse and vouched for the credibility of the state's witnesses, yet his conduct did not render the proceeding fundamentally unfair because of the overwhelming strength of the state's case), cert. denied, _____U.S. _____, 103 S. Ct. 3544 (1983); note 15 supra. [24/] Second, any prejudice that resulted from the prosecutor's comments about the availability of Woods as a witness was at least partially cured by Bennett's re-direct examination of Dobbs. Third,

any confusion regarding the burden of proof caused by the prosecutor's closing remarks ("of course, if you find that he didn't do it, or if you have a reasonable doubt, then you can acquit him") was cured by the trial court's instruction regarding the burden of proof. See Duncan v. Stynchcomb, 704 F.2d 1213, 1215-16 (11th Cir. 1983); ST. at 486-87, 497-98. Fourth, none of the prosecutor's remarks implicate fundamental rights of the accused, such as the right to remain silent or the right to counsel. See Duncan, supra; Darden, supra, at 1036. 25/ Fifth, the allegedly improper remarks are relatively isolated. Thus, although the prosecutor's allegedly improper remarks were probably deliberate, the overwhelming weight of the state's case and the isolation of the remarks lead to the conclusion that they did not render the petitioner's trial fundamentally unfair.

XVI. THE AGGRAVATED ASSAULT CHARGE

In Count 15 of his petition, Dobbs argues that the trial judge's failure to define the word "assault" in his aggravated assault charge resulted in a violation of Dobbs' constitutional rights.

In charging the jury, the trial judge did state that "a person commits aggravated assault when he is assaulted with a deadly weapon, that is with reference to Count 1 and Count 2." Respondent's Exhibit No. 2 at 491. The trial judge also read to the jury the allegations of assault contained in the indictment (Counts 1 and 2):

> This indictment charges that the said Wilburn Wiley Dobbs did on the fourteenth day of December in the year of our Lord 1973 in Walker County, Georgia, unlawfully and with force and arms did make an assault upon the person of William Austin with a certain shotgun, a deadly weapon, and did shoot at and toward the said William Austin contrary to the laws of said State, the good order, peace and dignity thereof. That is Count One.
>
> Count Two charges that the Grand Jurors aforesaid on their oaths aforesaid in the name and behalf of the citizens of Georgia, doth further charge and accuse the said Wilburn Wiley Dobbs with the offense of felony for that the said Wilburn Wiley Dobbs did on the day and date aforesaid, in the County aforesaid, unlawfully and with force and arms did make an assault upon the person of Grace Foster with a certain shotgun, a deadly weapon, did hit and beat the said Grace Foster with said shotgun contrary to the laws of said State, the good order, peace and dignity thereof. That's Count Two.

Id. at 483-84. 26/

A defective jury charge raises an issue of constitutional dimension only if it renders the entire trial fundamentally unfair. See Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Cir. 1983). Furthermore, a charge should be considered as a whole, and if it presents the issues to a jury fairly, it is constitutionally sound. See Davis v. McAllister, 631 F.2d 1256, 1260 (5th Cir. 1980), cert. denied, 452 U.S. 907 (1981).

In this case some confusion could result from the failure of the trial judge to define the word assault. Although assault is a commonly used word, same individuals may consider an assault to be defined as a violent action resulting in injury. [27] This confusion does not render Dobbs' trial fundamentally unfair, however, for two reasons. First, this confusion is alleviated somewhat by the manner in which the allegations of assault are defined in the indictment. Second, the confusion does not reach the point of shifting the burden of proof to the petitioner. See Smith v. Smith, 454 F.2d 572, 573-79 (5th Cir. 1971), cert. denied 409 U.S. 885 (1972). The charge given by the trial judge therefore is constitutionally adequate.

XVII. THE SANDSTROM CHARGES

In Count 16 of his petition, Dobbs contends that the charge given by the trial judge during the guilt/innocence portion of his trial impermissibly shifted the burden of proving intent. The relevant portions of the allegedly burden-shifting charge are as follows.

> I instruct you that every person is presumed innocent until proven guilty, no person shall be convicted of a crime unless each element of such crime is proven beyond a reasonable doubt.
>
> I charge you further that this defendant enters upon the trial of this case with the presumption of innocence in his favor and this presumption remains with him throughout the trial of the case and entitles him to an acquittal at your hands until and unless the State, by carrying the burden of proof, removes and overcomes this presumption of innocence by the introduction of evidence in your presence and hearing which convinces your minds of his guilt to a moral and reasonable certainty and beyond a reasonable doubt.
>
> This reasonable doubt, ladies and gentlemen, means just what it says, it is not a fanciful or a capricious doubt, but it is the doubt that would remain in the mind of a fair-minded impartial juror honestly seeking for the truth after having listened to all of the testimony in the case.
>
> So long as this doubt remains in your mind, it is your duty to give the defendant the benefit of the doubt and acquit him, but if this doubt does not longer exist, you would be authorized to convict him.

. . .

I charge you that a crime is a violation of a statute of this State in which there shall be a union of joint operation of act and intention. I further charge you that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but this presumption may be rebutted. I charge you that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but this presumption may be rebutted.

As to intent, I charge you that the intent to commit the crimes charged in this bill of indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury and is ordinarily ascertained by act and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before them.

Intent may be inferred from the proof and circumstances or by acts and conduct or it may be presumed when it is the natural and necessary consequences of the act.

ST. at 386-87, 493-94. The petitioner argues that the last paragraph of the above-quoted portions of the charge (the seventh paragraph) is burden-shifting, in violation of Sandstrom v. Montana, 442-44 U.S. 570 (1979). Both the fifth and the seventh paragraphs of the charge, however, present burden-shifting issues.

The Court of Appeals for the Eleventh Circuit recently concluded that a jury charge identical to the fifth paragraph of the above charge impermissibly shifted the burden of proof

(53)

to the defendant in violation of Sandstrom. See Franklin v. Francis, slip op. at 677-81 (11th Cir. Nov. 16, 1983). The charge in Franklin provided:

> [t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

Id. at 679. The Franklin holding is obviously binding authority, and compels the conclusion that the fifth paragraph of the charge violates Sandstrom. Franklin does not, however, end the analysis, as a determination must be made regarding whether the Sandstrom error is harmless. See id. at 681.

In Connecticut v. Johnson, slip op. (U.S. Sup Ct. Feb. 23, 1983), the Supreme Court held, in a plurality opinion, that a Sandstrom error could never be considered harmless error. A plurality opinion of the Supreme Court does not overrule past precedent, however, and the law of this Circuit before Connecticut was "that a Sandstrom error may be held harmless. . . ." Spencer v. Zant, 715 F.2d 1562, 1578 (11th Cir. 1983) (emphasis added) (citing Lamb v. Jernigan, 683 F.2d 1332, 1342 (11th Cir. 1982), cert. denied, _____U.S. _____, 103 S. Ct. 1276 (1983)). Whether a Sandstrom error is harmless thus must be determined on a case-by-case basis, and cases in this Circuit which have addressed this issue have reached different results. Compare Franklin, supra, at 681 (error not harmless because the sole defense was lack of intent to kill and the facts did not overwhelmingly preclude that defense) with Brooks v. Francis, 716 F.2d 780, 793-94 (11th Cir. 1983) (harmless error where there was overwhelming evidence of guilt) and Spencer, supra (same).

(54)

In this case Dobbs did not rely on a lack of intent offense; rather, he contended that he was not present during the Sizemore incident. The evidence regarding Dobbs' presence at the store -- and his role as the triggerman -- is, however, overwhelming. Both Foster and Austin, who were eyewitnesses to the incident, positively identified Dobbs as the triggerman. Harris, an accomplice, implicated Dobbs as the mastermind of the robbery, although he later recanted this testimony. Dobbs presented no alibi witnesses during the trial, although alibi evidence was presented during later proceedings. And two items taken from Foster during the robbery -- a tobacco sack and a knife -- were found in Dobbs' car. Thus, this Court is compelled to conclude that the Sandstrom error found in the trial judge's charge is harmless beyond a reasonable doubt.

Regarding the instruction contained in the seventh paragraph of the above-quoted portions of the trial judge's charge, Hance v. Zant, 696 F.2d 940 (11th Cir), cert denied, ____U.S. _____ 103 S. Ct. 3544 (1983), is directly on point. In Hance the charge that "intent may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequence of the act" was held not to be burden-shifting. Again, this holding is binding authority and disposes of the second Sandstrom issue. See also Lamb, supra, at 1338-40.

XVIII. THE WITHERSPOON EXCLUSION ISSUE

In Counts 17 and 18 of his petition, Dobbs argues that the systematic exclusion from the jury of all persons having conscientious or religious scruples against the imposition of the death penalty violated his constitutional right to a fair trial because the jury was not comprised of a representative cross-section of the community. It has been held in this Circuit, however, that the exclusion of venirepersons under Witherspoon does not violate the "representative cross-section of the community" requirement contained in the sixth and fourteenth amendments. See Corn v. Zant, 708 F.2d 549, 565 (11th Cir. 1983); Smith v. Balkcom, 660 F.2d 573, 574-79 (5th Cir. 1981), cert. denied ____U.S. _____, 103 S. Ct. 181 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 596-98 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). The contentions contained in Counts 17 and 18 of the petition therefore are unpersuasive.

In a contention related to Counts 17 and 18, Dobbs argues that his constitutional right to a fair trial was violated by the Witherspoon qualification of jurors because "he was convicted and sentenced to die by a jury that [was] biased in favor of the prosecution on the issue of Petitioner's guilt of the crime with which he was charged, and biased in favor of the use of the death penalty against black persons" (Count 19). It has been held, however, that the Witherspoon-qualification of a jury does not result in a "prosecution-prone" jury, see Corn, supra; McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983); Smith, supra; Spinkellink, supra, and Dobbs has presented no evidence regarding whether the Witherspoon-qualification of jurors resulted in a jury biased in favor of imposing the death penalty on black defendants. He had the opportunity to do so at the evidentiary hearing. The contention contained in Count 19 thus is without merit.

XIX. THE WITHERSPOON ISSUE

In Count 20 of his petition, Dobbs contends that "Juror Virginia E. Mitchell was improperly excused without a declaration of her being unalterably opposed to capital punishment, in violation of Petitioner's right to a fair trial. . . . " Petition at 11. Regarding the excusal of venirepersons by the state-trial court because of their personal feelings towards the death penalty, it is well-settled that the court may exclude only those venirepersons who make it "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, 391 U.S. 510, 522-23 (1968). The standard for the excusal of a juror under Witherspoon is exacting. See Witt v. Wainwright, 714 F. 2d 1069, 1081 (11th Cir. 1983)("a prospective juror may even concede that his or her feelings about the death penalty would possibly color an objective determination of the facts of a case without admitting of the necessary partiality to justify excusal").

The qualification of Mitchell proceeded as follows:

MR. SELF Are you conscientiously opposed to capital punishment? One, if Your Honor please.

THE COURT: What is the juror's name?

MRS. MITCHELL: Virginia E. Mitchell.

THE COURT: Virginia Mitchell.

MRS. MITCHELL: Uh-huh.

THE COURT: Now Mrs. Mitchell, you said you were conscientiously opposed to capital punishment, that means inflicting the death penalty?

MRS. MITCHELL: Yeah.

THE COURT: Are your convictions and your opposition to that so fixed and so firm and so ingrained in you that you would never under any circumstances vote to impose the death penalty?

MRS. MITCHELL: No.

THE COURT. Is it so strong that you would ever refuse to consider imposing the death penalty?

MRS. MITCHELL: If it was my family I would still.

THE COURT: It wouldn't matter how severe the evidence might show a case to be, you would still refuse to invoke the death penalty?

MRS. MITCHELL: Yes, sir.

THE COURT: I'm going to let her go off for cause.

Respondent's Exhibit No. 3 at 52-53.

Although Mitchell answered "no" to the court's question regarding whether her conviction about the death penalty would preclude her from imposing it "under any circumstances" her answers to the court's other questions indicate an unequivocal conscientious objection to the imposition of the death penalty. Furthermore, the court's questions progress as if Mitchell had answered "yes" to the court's second question. Cf. Brooks v. Francis, 716 F.2d 780, 794-95 (11th Cir. 1983)("it is entirely possible that the juror misunderstood the meaning of [a word]"). The Court therefore concludes that Mitchell was properly excluded from the jury under Witherspoon. See Spencer v. Zant, 715 F.2d 1562, 1576-77 (11th Cir. 1983)(venireperson's statement that his "reservations about the death penalty were such that he would 'refuse to even consider its imposition in the case before [him] under any circumstances'" met Witherspoon, notwithstanding the fact that his initial voir dire answers were equivocal). 28/

XX. THE SENTENCING CHARGE

In Count 23 of his petition, Dobbs assails the adequacy of the sentencing charge given by the trial judge. He contends that the charge failed to adequately 1) instruct the jury on mitigating circumstances, and 2) limit the jury's discretion in imposing the death penalty.

The trial judge made the following statement at the beginning of the sentencing portion of the trial:

> Now it is your duty to determine within the limits prescribed by law the penalties which shall be imposed as punishment for these offenses, and in arriving at this determination you are authorized to consider all of the evidence received here in Court presented by the State and the defendant throughout the trial before you, you are authorized to consider the facts and circumstances, if any, in extenuation, mitigation or aggravation of punishment, however, it is not essential to your decision that you find extenuating or mitigating facts and circumstances on the one hand or facts and circumstances in aggravation on the other.

ST. at 505-06. After the presentation of evidence and argument of counsel, the trial judge stated:

> Ladies and gentlemen, in this presentence investigation and the trial of this case, you have had evidence presented for your consideration by the State in aggravation, you have had argument by the State in aggravation, or what he contends is aggravation, and you have heard argument by counsel for the defendant in mitigation and extenuation.

Id. at 507.

Next, the trial judge instructed the jury on the penalties for armed robbery and aggravated assault. He then instructed the jury on the penalties for murder:

> As to count five, the punishment for murder, ladies and gentlemen, is that of life imprisonment or death by electrocution. Before you would be authorized to fix a sentence which would require the court to sentence him to death by electrocution, you would have to find beyond a reasonable doubt that one of the aggravating circumstances which the Legislature has provided for in capital felonies where the death sentence can be imposed and where the death sentence is asked for, have provided ten different statutory aggravating circumstances.
>
> I submit to you that of those ten there is only one that you may consider in determining whether or not he should be put to death by electrocution, and I will read that to you.
>
> You would have the authority to return a verdict of death by electrocution if you found beyond a reasonable doubt that in this case the offense of murder was committed while the defendant was engaged in the commission of another capital felony.
>
> Now I instruct you that notwithstanding the fact that I told you you could not give the death penalty for the armed robberies, armed robbery, however, is defined as a capital felony under the laws of this state, and you may consider whether or not he was engaged in the commission of another capital felony when he committed the offense of murder of which you found him guilty.
>
> Now if your verdict is life imprisonment, the form of your verdict would be as to count five, we the jury fix the punishment of the defendant on count five at life imprisonment in the penitentiary.

If your verdict be death by electrocution on count five, the form of your verdict would be we the jury fix the punishment of the defendant on count five at death - to death by electrocution and that would mean that the Court, if you did so, would have to - would sentence him to death by electrocution.

You will have out with you in writing this one statutory ground that the Court has permitted you to consider in determining whether or not the death penalty will be imposed. Now it will also be necessary if your verdict on count five is death by electrocution, you must in writing write out the statutory ground which you find him to be guilty of in arriving at the verdict of death by electrocution you will have that with you in writing, that statutory ground which the Court has authorized you to consider if you see fit to do so.

All of this is within your discretion, all of this is a matter that would address itself to you, all the punishment of the defendant or all defendants addresses itself to the sound discretion of the jury.

Now I instruct you our law says in arriving at your verdict in these cases, beyond prescribing the limits which a jury can go, the law provides no standards for the guidance of the jury in the selection of the penalty but rather commits the whole matter of determining which penalty shall be fixed to the judgment, conscience and absolute discretion of the jury.

The only standard, if any, that you will be permitted to consider in arriving at whether or not you will inflict the death penalty is the question of whether or not you find beyond a reasonable doubt that this defendant committed the offense of murder while engaged in the commission of another capital felony.

I charge you further that a finding of a statutory aggravating circumstance shall only be based upon evidence convincing your minds beyond a reasonable doubt as to the existence of that particular charge on that particular crime.

Id. at 511-14 (emphasis added).

After a bench conference, the trial judge gave additional instructions on the penalties for armed robbery and aggravated assault. He then gave the following additional charge regarding the death penalty:

Now I charge you further that if you find that there is an aggravating circumstance as I have described to you, before you can impose the death penalty, you're not bound - you don't have to impose the death penalty, that's still a matter within your discretion, that's still a matter of your discretion as to what your sentence will be, even though you find beyond a reasonable doubt that he committed the offense of murder while engaged in the offense of armed robbery, which is a capital felony, you're still not bound to sentence him to death by electrocution, you could still, if you see fit to do so, sentence him to life imprisonment, but it would have to be either life imprisonment or death by electrocution, but you are not bound to sentence him to death even though you find there is an aggravating circumstance which the Legislature saw fit for a jury to consider.

Id. at 516.

In Westbook v. Zant, 704 F.2d 1487 (11th Cir. 1983), a jury instruction which is similar to the above instruction was challenged because of its vagueness regarding mitigating circumstances. The instruction provided:

You are authorized to consider the facts and circumstances, if any, in extenuation, mitigation or aggravation of punishment which may have been submitted to you. However, it is not essential to your decision that you find extenuating or mitigating facts and circumstances on the one hand, or facts and circumstances in aggravation on the other. Please do not confuse this with a charge which I shall give you a little bit later insofar as a statutory aggravating circumstance may be concerned.

. . .

> [y]ou do not have to make up your own statutory aggravating circumstance, you only have to determine whether you think that one or other of those claimed as to the various counts did, in fact, exist. And then you must either make one recommendation for death or a recommendation for mercy and life imprisonment, and, of course, as the law says, if you find no statutory aggravating circumstances, then the defendant would have to be sentenced to life imprisonment in accordance with the law.

Id. at 1501-03.

The court held that the challenged instructions were constitutionally deficient because they did not clearly guide the jury in their understanding of mitigating circumstances:

> A full examination of the charge does reveal constitutionally deficient instructions furnishing a basis for habeas corpus relief. The charge fails to provide clear instructions on the function of mitigating circumstances and no guidance on the relationship between mitigating and aggravating circumstances. As Spivey v. Zant teaches, jury instructions must "describe the nature and function of mitigating circumstances and "communicate to the jury that the law recognizes the existence of facts or circumstances which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence." The Spivey court explained that most cases will require the court to "tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations."
>
> Although the charge authorized the jury to consider circumstances in extenuation or mitigation, the court failed to explain what function such a consideration would play in sentencing deliberations. An authorization to consider mitigating circumstances is a hallow instruction when unaccompanied by an explanation informing the jury why the law allows such a consideration and what effect a finding of mitigating circumstances has on the ultimate recommendation of sentence. We cannot fit this instruction within the requirements of Spivey: "Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose . . . violate the eighth and fourteenth amendments." Therefore, Westbrook's habeas corpus petition seeking relief from his death sentences must be granted on this ground because of the sentencing instruction's inadequacies concerning the nature and function of mitigating circumstances.

Id. at 1503 (citations omitted). See also Finney v. Zant, 709 F.2d 643, 646-47 (11th Cir. 1983); Goodwin v. Balkcom, 684 F.2d 794, 798-803 (11th Cir. 1983), cert denied, ____U.S. _____, 103 S. Ct. 1798 (1983); Spivey v. Zant, 661 F.2d 464, 472 (5th Cir. 1981), cert. denied, _____U.S. _____, 102 S. Ct. 3495 (1982).

In light of Westbrook it is clear that the trial judge's charge is constitutionally deficient. It does not define a mitigating circumstance, describe the nature and function of mitigating circumstances, or provide guidance regarding the relationship between aggravating and mitigating circumstances. Accordingly, Dobbs' writ of habeas corpus must issue. His sentence of death therefore is vacated, subject to the state's right to resentence Dobbs within a reasonable time.

Because the Court finds that the sentencing charge is constitutionally defective due to its failure to describe the role of mitigating circumstances, it is unnecessary to decide

1) whether the charge is constitutionally defective because it failed to limit the jury's discretion in imposing the death sentence, 2) whether the admission of Dobbs' prior convictions during the sentencing phase of his trial was constitutional error (Count 22), 3) whether the trial judge's refusal to answer a question about the availability of parole during its sentencing deliberations was constitutional error (Count 24), 4) whether the jury's sentencing verdict was constitutionally inadequate (Count 25), 5) whether the fact that the jury allegedly sentenced Dobbs to death thinking that he would not be executed constituted constitutional error (Count 39), and 6) whether Dobbs' sentence of death was imposed as a result of passion, prejudice or other arbitary considerations (Counts 26, 27 and 28).

XXI. THE FAILURE OF THE INDICTMENT TO ALLEGE AGGRAVATING CIRCUMSTANCES

In Count 29 of his petition, Dobbs contends that his due process right to notice of the charges pending against him was violated because none of the aggravating circumstances considered by the jury in imposing the sentence of death were alleged in the indictment. The Court finds this contention unpersuasive and agrees with the Magistrate's analysis. See generally Clemons v. Dougherty County, 684 F.2d 1365, 1374 (11th Cir. 1982). 29/

XXII. PROPORTIONALITY REVIEW

In Count 30 of his petition, Dobbs contends that the Georgia Supreme Court, in reviewing Dobbs' conviction on direct appeal, did not "properly compare [the sentence imposed in] this case with other similar cases," i.e. it did not properly conduct a proportionality review. Petition at 19. Before evaluating this contention, it is necessary to discuss the function of the Georgia Supreme Court in reviewing death penalty cases on direct review and the federal habeas standard for reviewing the actions of the Georgia Supreme Court.

Under Georgia law, the Georgia Supreme Court must conduct an expedited direct review of a case in which the death penalty is imposed. See O.C.G.A. § 17-10-35 (Michie 1981)(formerly Ga. Code Ann. § 27-2537 (Harrision 1978)). In reviewing a death sentence, the court must determine whether the sentence was imposed "under the influence of passion, prejudice, or any other arbitrary factor," whether the evidence supports the finding of a statutory aggravating circumstance, and "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(d) (Michie 1981). The court must also include in its decision a reference to those "similar cases" which it took into consideration. Id. § 17-10-35(e).

Moore v. Balkcom, 709 F.2d 1353 (11th Cir. 1983),

sets forth the standard that a federal court should use when reviewing the proportionality analysis conducted by a state court. The Moore court first stated that a federal court's only task is to determine "whether the [state] court has 'properly performed the task assigned to it under the [applicable statutes].'" Id. at 1359 (quoting Gregg v. Georgia, 428 U.S. 153, 224 (1976)). The court also stated that a federal court's function is limited to determining whether "the application of approved sentencing procedures in a particular case creates a substantial risk that the punishment has been inflicted in an arbitrary and capricious manner." Moore, supra (citing Edmund v. Florida, ___U.S.___, 103 S. Ct. 3368 (1982)). Thus, a case-by-case analysis of the cases used by a state court in its proportionality review is inappropriate. See Moore, supra. When, however, a "petitioner who has been sentenced to death can show that the facts and circumstances of his case are so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience," habeas corpus relief should be granted. Moore, supra, at 1359-60.

In reviewing Dobbs' conviction on direct appeal, the Georgia Supreme Court first found that "the evidence supports the jury's finding of a statutory aggrivating circumstance, i.e., that

the offense of murder was committed while the offender was engaged in another capital felony (armed robbery)." Dobbs v. State, 236 Ga. 427, 433 (1976), cert. denied, 430 U.S. 975 (1977). The court then "compared the evidence and sentence in this case with similar cases . . . [and found that] Dobbs' sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." Id. The "similar cases" the court refers to involve murders committed during an armed robbery. See, e.g., Berryhill v. State, 235 Ga. 549 (1975); Mitchell v. State, 234 Ga. 160 (1975); Lingo v. State, 226 Ga. 496 (1970). The court then upheld Dobbs' sentence of death.

The proportionality review conducted by the Georgia Supreme Court "provided an adequate safeguard against the freakish imposition of capital punishment," Moore, supra, at 1360, and is therefore constitutionally adequate.

XXIII. FAILURE TO TRANSCRIBE PORTIONS OF THE STATE TRIAL

In Count 31 of his petition, Dobbs contends that the failure to send a transcript of 1) defense counsel's closing argument during the guilt/innocence phase of the trial, and 2) both the defense counsel and the prosecutor's closing argument during the penalty phase of the trial to the Georgia Supreme Court, so that the court could properly review the sentencing procedure, violated his due process and equal protection rights. In Corn v. Zant 708 F.2d 549, 560 (11th Cir. 1983) a similar contention was raised. In Corn the petitioner argued that his state trial counsel's failure to order a transcript of the opening and closing arguments deprived him of effective assistance of counsel. The Corn court first noted that there is no statutory duty to transcribe these arguments, and disposed of this contention as follows:

> Corn contends . . . that the Supreme Court of Georgia could not properly assess the fairness of his death sentence without considering the opening and closing remarks.

> [Corn also insists that] there is no greater opportunity for prejudice than in the arguments of counsel, and that the failure to preserve that part of the proceedings was error of a constitutional magnitude. He did not, however, object to any part of the opening or closing statements, nor does he point to any infirmities during those phases of the trial. Absent any showing of harm by a petitioner, it is settled that failure to transcribe counsel's arguments is not a constitutional violation requiring vacation of a death sentence.

Corn, supra, at 560 (citations omitted); see also Stephens v. Zant, 631 F.2d 397, 402-04 (5th Cir. 1980), rev'd on other grounds 33 Cr. L. 3195 (U.S. Sup. Ct. June 22, 1983).

In this case the only untranscribed argument that could have been inflammatory was the prosecutor's closing argument during the sentencing phase of the trial. It is apparent, however, that this argument was not inflammatory. Bennett did not raise any objections to, nor does he recall any inflammatory remarks being made during, this argument. See Respondent's Exhibit No. 3 (Affidavit of Bennett). Furthermore, the court reporter states in his affidavit that 1) although he did not transcribe the prosecutor's closing argument during the penalty phase of the trial, 2) it was his practice to record all objections made during such arguments, and 3) he recorded no objections to the prosecutor's closing argument. See id. (Affidavit of Towns). The petitioner's contention therefore is without merit.

The Court also notes the trial judge provided the Georgia Supreme Court with a record that was "more than adequate to permit the [Supreme Court] to determine whether the death penalty was imposed with an even hand." Stephens, supra, at 403. Specifically, the trial judge submitted a detailed, seven-page report to the Supreme Court as part of the record. See Respondent's Exhibit No. 4. This report was required to be submitted to the Supreme Court by statute, see Ga. Code Ann. § 27-2537(a) (Harrison 1978), and described the trial and the basis for the imposition of the death penalty.

In Count 33 of his petition, Dobbs contends that the failure of the Georgia Supreme Court to forward a copy to this Court of the transcript of the closing arguments of counsel during the guilt/innocence and sentencing portions of the trial prevents this Court from performing an adequate habeas corpus review. For the reasons outlined above, this contention is also without merit.

XXIV. INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

In Count 34 of his petition, Dobbs contends that he was denied the effective assistance of counsel during the direct appeal of his conviction because 1) his attorney [30] failed to appear at oral argument before the Georgia Supreme Court, and 2) there "were shortcomings and delays in filing an appellate brief." Petition at 21. Dobbs' counsel did, however, appear at oral argument before the Georgia Supreme Court. See Dobbs v. State, 236 Ga. 427, 434 (1976); SHC at 117. [31] Furthermore, the petitioner has not presented any evidence regarding the shortcomings of the appellate brief. [32] Accordingly, this contention is without merit.

XXV. CONSTITUTIONAL CHALLENGE TO GEORGIA'S APPELLATE REVIEW PROCEDURE

In Count 35 of his petition, Dobbs argues that Georgia's system of appellate review of death sentences is unconstitutional. This contention was rejected by the United States Supreme Court and is without merit. See Zant v. Stephens, No. 81-89 (U.S. Sup. Ct. June 22, 1983); Gregg v. Georgia, 428 U.S. 153 (1976).

XXVI. THE COMPOSITION OF THE GRAND AND TRAVERSE JURIES

In Count 36 of his petition, Dobbs contends that he was indicted by an unconstitutionally selected grand jury because there was a "systematic exclusion of blacks, women, young people between 18 and 30 years of age, and poor people from the grand jury venire. . . . " Petition at 22. Dobbs raises a similar contention in Count 37 as to the traverse jury. [33] Dobbs has, however, submitted evidence only on the issue of whether women were systematically excluded from the grand jury venire. The other challenges to the grand and traverse juriers therefore will not be addressed and provide no grounds for relief.

The prerequisites for federal relief from the allegedly discriminatory selection of a grand jury were established in Castaneda v. Partida, 430 U.S. 482 (1977). Under this standard, a petitioner is entitled to relief if he

> (1) establish[es] that the group against whom discrimination is asserted is a recognizable, distinct class; (2) prove[s] [a significant] degree of underrepresentation [of the class on the grand jury venire] by comparing the proportion of the [class] in the total population to the proportion called to serve [on a grand jury] over a significant period of time and (3) show[s] that the selection procedure is susceptible to abuse or is not class neutral.

Id. at 494; see also Ross v. Hopper, 716 F.2d 1528, 1538 (11th Cir. 1983); Gibson v. Zant, 705 F.2d 1543, 1546 (11th Cir. 1983).

The first portion of the Castaneda standard is met in this case because women clearly are a cognizable class. See Gibson, supra, at 1547 (citing Taylor v. Louisiana, 419 U.S. 522 (1975)); see generally Willis v. Zant, slip op. at 707-10 (11th Cir. Nov. 17, 1983). The second portion of this test requires proof of a significant degree of underrepresentation of this class on the grand jury venire over a significant period of time. Castaneda, supra. Dobbs has submitted proof showing an underrepresentation of women on the grand jury venire that indicted Dobbs of 16.6%. See SHC at 42-43. This degree of underrepresentation is significant. See Hernandez v. Texas, 347 U.S. 475, 480-81 (1954)(14%); Birt v. Montgomery, 709 F.2d 690, 700-01 (11th Cir. 1983)(17% to 33%); Gibson, supra (29% to 38%). 34/ In analyzing the grand jury venire, Dobbs used data that span a 24 month period; thus, the degree of underrepresentation of women is shown "over a significant period of time." See Birt, supra (underrepresentation over a 5 year period); Gibson, supra, at 1546, 1547 (10 year period); Machetti, supra, at 238, 240-41 (20 month period). 35/

The third portion of the Castaneda standard requires a showing that a jury selection procedure is not class neutral. In evaluating whether Dobbs has met this portion of the standard, the Court will first review the Georgia law which outlines the procedures jury commissioners should follow in compiling jury lists to determine if the statutory method of selecting jurors is class neutral. The Court will then examine the actual procedures used by the commissioners who selected the members of the grand jury that indicted Dobbs to determine if their method of selection is class neutral.

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Georgia law § 59-106, which was in effect when Dobbs was indicted, sets out the procedure to be followed by jury commissioners in composing a jury list:

> At least biennially, or, if the senior judge of the superior court shall direct, at least annually, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the country to serve as jurors. In composing such list the commissioners shall select a fairly representative crosssection of the intelligent and upright citizens of the county from the official registered voters' list of the county as most recently revised by the county board of registrars or other county election officials. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly represented thereon.
>
> After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead.

1973 Ga. Laws at 485-86. The Supreme Court has held that this method of selection is not inherently unfair, but contains the possibility of abuse. See Turner v. Fouche, 396 U.S. 346, 355 (1970). Thus, on its face, Georgia law § 59-106 is class neutral. The Court must therefore evaluate the procedures employed by the jury commissioners who selected the grand jury that indicted Dobbs to determine if they are class neutral.

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Sidney Porter, a jury commissioner for Walker County, described, during the state habeas corpus hearing, how the grand jury lists for Walker County are compiled. He states that this procedure was used in selecting the grand jury that indicted Dobbs. The jury commissioners -- six in all -- take the most recent voter registration list and apparently divide it up equally. See SHC at 32. Each commissioner screens the list for deceased persons. Each commissioner then picks every fifth, sixth or tenth name for the grand jury. No other criteria are used to select the grand jury and the superior court judge does not alter the composition of the grand jury. See id. at 32-39.

Because this procedure is class neutral the third portion of the Castaneda standard is not met. Accordingly, Dobbs' challenge to the composition of the grand jury is without merit. Compare Birt, supra, at 700 ("potential jurors were occasionally selected by accepting or rejecting names on the county voter registration lists based upon the commissioners personal knowledge of the individuals or their family background"); Gibson, supra, at 1548 ("In preparing the [grand jury] lists the jury commissioners met jointly, went over every name on the registered voter's list, relied upon the knowledge of one or more of commissioners as to each registered voter, and either included or excluded each registered voter from the jury lists").

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XXVII. DENIAL OF FUNDS FOR INVESTIGATION AND PRESENTATION OF THE STATE HABEAS PETITION

In Count 38 of his petition, Dobbs argues that his sixth and fourteenth amendment rights were violated by the failure "of the State of Georgia . . . to provide [funds for] counsel, pay the costs of subpoenas and mileage for witnesses, pay for expert witnesses, an investigator and . . . other costs" during the state habeas corpus proceedings. Petition at 31.

At the state habeas corpus proceeding, Dobbs' counsel, Mr. Altman, moved for these funds. In making this motion he admitted that under Georgia law, a petitioner "has no right to either appointed counsel or to mileage and subpoena costs or for any cost for expert witnesses, investigators and so forth." Id. He argued, however, that the heightened standards of due process applicable to a death penalty case, and the petitioner's equal protection rights, justified the disbursement of state funds for these purposes. See generally Gardner v. Florida, 430 U.S. 349 (1979). The state habeas judge denied Altman's motion. Altman raises the same arguments in this petition.

(80)

In Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983), a similar contention was made. There the petitioner's trial counsel moved the state trial court to appoint an independent qualified psychiatrist to determine whether the petitioner's prior incarceration had affected his ability to conform to acceptable societal standards. This evidence was to be used to demonstrate the mitigating circumstance of the debilitating affect of this incarceration.

In evaluating this contention, the court focused on the "unquestionable right" of a defendant in a capital murder trial to proffer "any evidence of mitigation submitted as a basis for a sentence less than death." Id. at 1495. The court then stated that it "interpret[ed] . . . a capital defendant's right to present evidence in mitigation [as] placing . . . an affirmative duty on the state to provide the funds necessary for production of the evidence . . . in those cases deemed appropriate by the state trial court." Id. Next, the court noted that the granting of a request for the appointment of an expert at trial is, under Georgia law, a matter of trial court discretion. The court then applied the relevant habeas corpus standard -- whether the

trial court abused this discretion. Id. at 1497. The court found no abuse in the denial of the request for the appointment of a psychiatrist because 1) the petitioner's inability to conform his conduct to acceptable societal standards due to a history of incarceration was not "a critical piece of evidence determinative of his guilt or innocence of the offenses charged;" 2) the petitioner's incarceration was placed before the jury by other evidence; and 3) the evidence the petitioner sought from the psychologist could have been demonstrated by other methods.

The limits of the Westbrook holding are unclear. Even its broadest reading does not afford the petitioner any relief, however, because he has neither a statutory or constitutional entitlement to the appointment of counsel, payment of witness fees and other costs during state habeas corpus proceedings. See Ross v. Moffitt, 417 U.S. 600, 617-18 (1974); Burston v. Caldwell, 477 F.2d 996, 999 (5th Cir. 1973); O.C.G.A. § 17-12-60 to -62 (Michie 1981) (counsel may be appointed in capital cases only for superior court proceedings and direct appeal). Even if such an entitlement existed, it would be unlikely that the petitioner could demonstrate any prejudice resulting from the denial of funds. He was ably represented by counsel during the state habeas corpus proceedings; he has not demonstrated that the denial of funds precluded any witness' testimony from being included in the record; and his general constitutional challenges

to the imposition of the death penalty in Georgia have been adequately raised in this proceeding. See Westbrook, supra, at 1497; Respondent's Exhibit No. 9.

XXVIII. RIGHT TO BE PRESENT AT NEW TRIAL HEARING

In Count 40 of his petition, Dobbs contends that his sixth amendment rights were violated by the trial judge's failure to order his presence at the extraordinary motion for a new trial hearing. The hearing was held to ferret out the Brady contention made by Dobbs, see generally pages 86-87, and to determine whether the testimony of Harris and Smith warranted the granting of a new trial. See generally pages 83-85. Dobbs' counsel made a motion to have him present at the hearing because "Dobbs has much greater information than I have" about the case. Respondent's Exhibit No. 10 at 5.

A defendant's right to be present at judicial proceedings stems from the confrontation clause of the sixth amendment and the due process clause of the fourteenth amendment. See Illinois v. Allen, 397 U.S. 337, 338 (1970). This right "extends to all hearings that are an essential part of [a criminal trial] -- i.e. to all proceedings at which the defendant's presence 'has a relation, reasonably substantial, to

the fullness of his opportunity to defend against the charge.'" Proffitt v. Wainwright, 685 F.2d 1227, 1256 (11th Cir. 1982), modified 706 F.2d 311, 312 (11th Cir. 1983); see United States v. Stratton, 649 F.2d 1066, 1080 & n. 20 (5th Cir. 1981) (defendant has constitutional right to presence at all stages of trial where his absence might frustrate the fairness of the proceedings).

Dobbs does not enjoy a constitutional right to be present at his extraordinary motion for a new trial hearing for two reasons. First, such a hearing is not an essential part of a judicial proceeding, as compared, for example, to the guilt/innocence portion of a trial. Cf. United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970)(evidentiary hearing on a suppression motion is not an essential part of a judicial proceeding), cert. denied, 409 U.S. 894 (1971); but cf. Proffitt, supra, at 1257 (post-trial sentencing hearing is essential part of a judicial proceeding). Second, Dobbs' presence at the extraordinary motion for a new trial hearing was not necessary to ensure the fairness of the hearing. The hearing was held to determine 1) whether the prosecutor committed a Brady violation, i.e., whether the prosecutor knew of and failed to disclose exculpatory evidence to the defense during the trial, and 2) whether the

testimony of Harris and Smith warranted the granting of a new trial. Thus, the focus of the hearing was on the conduct of the police and prosecutor in investigating Dobbs' case and on the testimony of Harris and Smith. Dobbs' presence was not necessary to conduct a thorough investigation into these areas at the hearing. Furthermore, Dobbs was ably represented by counsel at this hearing. Habeas corpus relief therefore will not be granted on the ground that Dobbs was not present at the extraordinary motion for a new trial hearing.

XXVIX. THE EXTRAORDINARY MOTION FOR A NEW TRIAL

In Count 41 of his petition, Dobbs contends that his due process rights were violated by the failure of the trial court to grant him a new trial based on newly discovered evidence. The evidence consisted of 1) Harris' recantation of his testimony that Dobbs was the triggerman, and 2) Smith's statement that she was talking to Dobbs on the phone when Sizemore's store was robbed. The trial court summarily denied the motion for a new trial. See Respondent's Exhibit No. 4 at 26 (Dobbs v. State, No. 8403 (Walker Cty. Sup. Ct. Sep3, 1975), aff'd 245 Ga. 208 (1980), cert. denied 446 U.S. 913 (1980)). This decision was appealed to Georgia Supreme Court, which affirmed the trial court:

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The trial court did not err in denying the extraordinary motion for new trial on all of its grounds.

The appellant contends that he was entitled to a new trial on the ground that the co-defendant, Walter Harris (who is now serving a life sentence for the murder), has subsequently recanted his testimony at trial that the appellant had participated in the crimes of which he was convicted. This newly discovered evidence is not so material that it would probably produce a different verdict. Even taking all of Harris' post-trial statement as being true, the testimony fails to exclude the appellant as the murderer, and there was sufficient evidence at the trial, including testimony of eyewitnesses, to authorize the verdict even without Harris' testimony.

"[I]t is incumbent on a party who asks for a new trial on the ground of newly discovered evidence to satisfy the court: (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; . . . " These criteria were not met with respect to Emma Jean Smith's claim that she was talking to the appellant on the telephone at the time the crimes occurred. In addition to the appellant, who obviously would have known of such conversation, Ms. Smith testified that she had notified not only the police but also the appellant's trial counsel of it. In spite of being given ample opportunity to secure witnesses, the appellant failed to have Ms. Smith subpoenaed, and even up to trial he would not provide his counsel with a witness list. Furthermore, the testmony of Ms. Smith was totally inconsistent with that of the appellant who accounted otherwise for his time during this period without mentioning a telephone conversation.

245 Ga. at 210 (citations omitted).

Because the propriety of granting a new trial is, at the least, a mixed question of law and fact, this Court is authorized to re-examine the state court's resolution of this issue. See Dickerson v. Alabama, 667 F.2d 1364, 1368-69 (11th Cir. 1982), cert. denied ____U.S. _____, 103 S. Ct. 173 (1982) (citing Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980)). This Court, like the Georgia Supreme Court, believes that the denial of the extraordinary motion for a new trial was proper. Smith's testimony does not warrant the grant of a new trial because, under Georgia law, evidence that is allegedly "newly discovered" must not have been overlooked due to a lack of diligence on the part of the movant. See Burge v. State, 133 Ga. 431, 432 (1909). Dobbs certainly should have known about his conversation with Smith at the time of trial. Similarly, Harris' testimony does not warrant the granting of a new trial. Under Georgia law, newly discovered evidence must also be "so material that it would probably produce a different verdict" in order to warrant the granting of a new trial. Johnson v. State, 240 Ga. 90, 92 (1977). In view of the overwhelming evidence of Dobbs' guilt, [36] Harris' testimony does not reach this level of materiality. Accordingly, the denial of the motion for a new trial was proper and did not violate any of the petitioner's constitutional rights.

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XXXV. WITHHOLDING OF EXCULPATORY EVIDENCE

In Count 42 of his petition, Dobbs contends that he was denied a fundamentally fair trial because the state withheld exculpatory evidence. See generally Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963). To support this contention, Dobbs points to the testimony of Emma Smith. She stated, in an affidavit submitted during the state habeas corpus proceeding, that she told several police officers within two days of Dobbs' arrest that she was talking to him at the time of the Sizemore robbery. Dobbs argues that the failure of the police to reveal this information to him gives rise to a Brady violation.

The state habeas court gave Dobbs a full and fair hearing on this issue, found Smith's testimony to be not credible and denied relief on this ground. See Dobbs v. Hopper, No. 77-185 at 2-3 (Tattnall Sup. Ct. Oct. 9, 1979).

The success of the petitioner's Brady contention centers on the credibility afforded Smith's testimony. Resolution of credibility issues rests within the province of the state habeas court, provided a petitioner is given a full and fair hearing. See Marshall v. Lonberger, ____U.S. _____, 103 S. Ct. 843, 851 (1983)(a federal habeas court is not given a "license to redetermine the credibility of witnesses whose demeanor

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has been observed by the state . . . court, but not by them"); Smith v. Kemp, 715 F.2d 1459, 1465 (11th Cir. 1983); 28 U.S.C. § 2254(d)(1977). Because the state habeas court gave Dobbs a full and fair hearing on the Brady issue and concluded that Smith's testimony is not credible, this Court is compelled to conclude that Dobbs' Brady claim is without foundation.

Dobbs' Brady claim is also without merit because prosecutors have no duty under Brady to disclose evidence that is available to the defense from another source. See generally United States v. Milstead, 671 F.2d 950, 953 (5th Cir. 1980)(per curiam). Here, Dobbs himself would have known about his conversation with Smith.

XXXVI. CONCLUSION

The petitioner's writ of habeas corpus shall issue insofar as it vacates his death sentence, subject to the state of Georgia's right to resentence him within 120 days, all in accordance with the Court's Order of December 30, 1983.

IT IS SO ORDERED, this the 13th day of January, 1984.

Harold L. Murphy
UNITED STATES DISTRICT JUDGE

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FOOTNOTES

1/ ST. refers to the transcript of the trial court proceedings.

2/ SHC refers to the transcript of the state habeas corpus proceedings.

3/ The petitioner omitted ground (32) in his habeas corpus petition.

4/ The assistance of counsel must "not be judged by benefit of hindsight, but must be reviewed 'from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the trial in question.'" Douglas v. Wainwright, 714 F.2d 1532, 1553-54 (11th Cir. 1983) (quoting Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981) cert. denied 456 U.S. 949 (1982)).

5/ The standard for ineffective assistance of counsel is the same in a capital case as in non-capital cases, see Stanley v. Zant, 697 F.2d 955, 962 (11th Cir. 1983), although the "seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." Proffitt v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982), petition for cert. filed, ___U.S. _____(1983).

6/ The court in Birt v. Montgomery, 709 F.2d 690 (11th Cir. 1983), also commented on an attorney's duty to investigate a case. It stated that "counsel should ideally perform a substantial investigation into each potential line" of defense. Id. at 701. The court then noted that when a reasonably substantial investigation into each potential defense is not conducted, the result of an ineffective assistance of counsel claim usually turns on the reasonableness of the assumptions made by counsel:

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> In most cases, strategy employed without a reasonably substantial investigation into all plausible lines of defense will be in part based upon the attorney's professional assumptions regarding the probable success of each line. The courts have found that a reasonable strategic choice based upon reasonable assumptions makes investigation into other plausible lines of defense unnecessary. Conversely, courts have found counsel ineffective where the failure to investigate is not based upon a reasonable set of assumptions or when those assumptions are not reasonable.

Id. (citations omitted).

7/ Georgia enacted this procedure as a result of Furman v. Georgia, 408 U.S. 238 (1972).

8/ FHC refers to the transcript of the federal habeas corpus evidentiary hearing.

9/ Although the King court found the petitioner's counsel to have rendered effective assistance during the guilt/innocence phase of the trial, it also held that petitioner's counsel provided ineffective assistance during the penalty stage of the trial because 1) he did not conduct an exhaustive investigation for potential mitigating evidence (although he did present one character witness), and 2) during his closing argument he stressed "the horror of the crime" rather than attempting to humanize the defendant." Id.

10/ The court also held that these shortcomings prejudiced the petitioner because four witnesses were discovered after the trial was completed whose testimony would have supported a plausible defense. See id. at 616.

11/ The court then held that counsel's ineffectiveness was prejudicial and granted the writ of habeas corpus. See id. at 1557-58.

12/ The petitioner contends that the trial judge's personal views about the kind of mitigating evidence that could be introduced during the sentencing phase of a capital trial "chilled the defense attorney" and prevented certain mitigating evidence from being introduced. It appears, however, that the trial judge's views did not significantly affect Bennett's decision to argue the evidence rather than to introduce mitigating evidence. See FHC at 72-75.

13/ Thus, the facts of this case reveal that the publicity attending Dobbs' trial does not approach the level of publicity found in Ross v. Hopper, 716 F.2d 1528, 1539-41 (11th Cir. 1983), or Brooks v. Francis, 716 F.2d 780, 785-87 (11th Cir. 1983), and the courts in Ross and Brooks held that the denial of a motion for a change of venue did not violate the petitioner's due process right to a fair trial.

14/ The standard for reviewing state-court evidentiary rulings was extensively discussed in Shaw v. Boney, 695 F.2d 528 (11th Cir. 1983):

> In reviewing the evidentiary determination of a state trial judge, we are mindful of the fact that we do not sit as a "'super' state supreme court." Unlike a state appellate court, we are not free to grant the petitioner relief simply because we believe the trial judge has erred. The scope of our review is severely restricted. Indeed, the general rule is that a federal court will not review a trial court's actions with respect to the admission of evidence. A state evidentiary violation in and of itself does not support habeas corpus relief. Before such relief may be granted, the violation must rise to the level of a denial of "fundamental fairness."
>
> In the context of state evidentiary rulings, the established standard of fundamental fairness is that habeas relief will be granted only if the state trial error was "material in the sense of a crucial, critical, highly significant factor." Moreover, application of this standard has been notably one-sided, consistent with the reluctance of federal courts to second-guess state evidentiary rulings. This court has established a well-documented resistance to granting relief when a habeas petition alleges a federal claim based merely on a state evidentiary ruling.

Id. at 53 (citations and fottnote omitted).

15/ Two eyewitnesses to the Sizemore incident positively identified Dobbs as the triggerman during the crime. One of his accomplices also identified him as the triggerman, although this testimony was later recanted. At trial, Dobbs' alibi defense was completely uncorroberated. And two items taken from Foster during the robbery were later found in Dobbs' car.

16/ See pages 86-87 infra.

17/ See note 15 supra.

18/ The Magistrate ruled that the identification contentions raised by Dobbs did not merit habeas corpus relief for two reasons: (1) the totality of the circumstances indicated that the identifications were reliable, and (2) Dobbs did not object to the identification testimony at trial. Under Wainwright v. Sikes, 433 U.S. 72 (1977), the failure to object to the admission of evidence during state court proceedings bars a petitioner from raising the evidentiary issue in a habeas corpus proceeding in the absence of cause and prejudice. In this case the trial judge ruled the identification testimony of Austin admissible before Bennett objected to it. Thus, cause for the failure to object to Austin's identification may exist. The Court need not address this issue, however, in view of its ruling on the merits of the claim.

19/ See note 15 supra.

20/ See note 15 supra.

21/ At the pre-trial hearing, Dobbs stated that he "had some witnesses" and that "they were on their way . . . " ST. at 7. He never specified who these witnesses were, where they lived or the relevance of their testimony. Thus, even if the trial court had the power to subpoena these witnesses, the refusal to summon them would not have deprived Dobbs of his right to compulsory process. See Hoskins v. Wainwright, 440 F.2d 69, 71 (5th Cir. 1971). Dobbs did name four potential witnesses who lived in Georgia. See ST. at 66-68, 143-45. These witnesses -- Wood, Bloodworth, Robinson and a polygraph examiner -- were subpoenaed. Bennett interviewed Wood, Robinson and the polygraph examiner and decided not to call them as witnesses. See id. at 241, 329, 372. The record does not indicate whether Bennett interviewed Bloodworth.

22/ Although the trial judge could not subpoena these witnesses, he offered to let Dobbs and Bennett use his phone to contact these witnesses. See ST. at 7-9.

23/ The standard for prosecutorial misconduct during the sentencing phase of a capital trial is less demanding because of the importance of excluding passion from the sentencing procedure. Compare Brooks v. Francis, 716 F.2d 780, 787-90 (11th Cir. 1983)(prosecutor's remarks during the sentencing procedure, which appealed to the patriotism of the jurors and which played of their fear of crime in the streets, rendered the procedure fundamentally unfair) and Hance v. Zant, 696 F.2d 940, 950-53 (11th Cir. 1983) (prosecutor rendered sentencing procedure fundamentally unfair because of a "dramatic appeal to gut emotion") cert denied, ___U.S. ____, 103 S. Ct. 3544 (1983) with McCorquodale v. Balkcom, 705 F.2d 1553, 1556-57 (11th Cir. 1983) (prosecutor's remark, during sentencing phase of capital trial, that the "appellate court will have a very important responsibility," did not render the trial fundamentally unfair, especially in light of a curative instruction).

24/ See also Brooks v. Francis, 716 F.2d 780, 787-90 (11th Cir. 1983)(prosecutor's remarks during guilt phase of capital trial, which included the comment that "the state has more witnesses than it would need to call to prove its case," and his statement of opinion regarding the credibility of prosecution and defense witnesses, did not render trial fundamentally unfair).

25/ Nor did the prosecutor express an opinion about Dobbs' guilt. See Francis v. Spraggins, slip op. at 661 (11th Cir. Nov. 14, 1983).

26/ The jury took the indictment to the jury room during its deliberation.

27/ Webster's New Collegiate Dictionary does not, however, make this mistake. An assault is defined as "an apparently violent attempt . . . to do hurt to another without the actual doing of the hurt threatened."

28/ Compare Brooks v. Francis, 716 F.2d 780, 794-95 (11th Cir. 1983)(no Witherspoon violation when two jurors, after they initially said that they were not conscientiously opposed to the death penalty, demonstrated that they would refuse to vote for the death penalty under any circumstances) and Corn v. Zant, 708 F.2d 549, 564-65 (11th Cir. 1983) (no Witherspoon violation where juror unequivocally stated that under no circumstances could she impose the death penalty) and McCorquodale v. Balkcom, 705 F.2d 1553, 1560 (11th Cir. 1983) (juror who stated three times that he could not impose the death penalty under any circumstances was properly excused under Witherspoon) and Darden v. Wainwright, 699 F.2d 1031, 1037-40 (11th Cir. 1983)(no Witherspoon violation where excused jurors "unequivocably answered that they would be 'unwilling under any circumstances' or 'unable without violating' their princples to recommend the death penalty") with Witt v. Wainwright, 714 F.2d 1069, 1082 (11th Cir. 1983) (Witherspoon violation where

juror excused because she thought her conviction against the death penalty would interfere with her evaluation of the defendant's guilt or innocence) and McCorquodale, supra, at 1556-60 (venirepersons who answered yes to three group questions -- whether they were conscientiously opposed to the death penalty; whether they could not, regardless of the evidence, vote to inflict the death penalty; and whether their opinion about the death penalty would keep them from being impartial -- were excused in violation of Witherspoon) and id. at 1560 (juror who said she did not think she could impose the death penalty was improperly excused) and Hance v. Zant, 696 F.2d 940, 955-56 (11th Cir.) (Witherspoon violation where jurors expressed uncertainty about their conviction regarding their ability to inflict the death penalty), cert denied, ____U.S. ____ 103 S. Ct. 3544 (1983) and Granviel v. Estelle, 655 F.2d 673, 677 (5th Cir. 1981) (juror who stated that he didn't think he could inflict the death penalty and who did not feel like he could take another person's life in that fashion, was improperly excluded from the jury on Witherspoon grounds) cert denied 455 U.S. 1003 (1982); cf. King v. Strickland, 714 F.2d 1481, 1492-93 (11th Cir. 1983) (no Witherspoon violation when prospective juror stated she could not be impartial in deciding the defendant's guilt).

29/ The Magistrate evaluates this contention as follows:

> In Ground 29 of the petition, petitioner claims that his death sentence violates his right to due process of law because his indictment did not include an allegation that the murder involved statutory aggravating circumstances. The Magistrate concludes that petitioner has failed to state a constitutional claim.
>
> The murder for which petitioner was sentenced to death was carried out during the course of an armed robbery. Petitioner was indicted for this armed robbery. Armed robbery was the only aggravating circumstance with which petitioner was charged and it clearly was included under the Georgia statutory provisions concerning aggravating circumstances. O.C.G.A. § 17-10-30(b)(2), formerly Ga. Code Ann. § 27-2534.1(b)(2). The defense attorney stated that his preparation for trial included preparation for the sentencing phase of trial (federal habeas corpus hearing transcript, p. 61). The Magistrate concludes that petitioner has failed to show any unfairness or lack of notice that would render the state's attempt to impose the death penalty violative of due process.

30/ Melvin Robinson handled the direct appeal of the petitioner's case.

31/ Counsel on direct appeal did obtain a continuance of the argument.

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32/ Substantial issues were raised on direct appeal. See Dobbs, supra, at 427-34; Respondent's Exhibit # 7 at 5 (state habeas opinion); compare Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983)(allegation of ineffective assistance of counsel on appeal found meritless because counsel filed a brief raising substantial legal claims) with Mylar v. Alabama, 671 F.2d 1299, 1302 (11th Cir. 1982)(failure to file a brief on a non-frivolous appeal constitutes ineffective assistance of counsel).

33/ This Court will entertain these claims on the merits because the state habeas court appears to have done so. See Machetti v. Linahan, 679 F.2d 236, 238 n. 4 (11th Cir. 1982), cert. denied, U.S. _____, 103 S. Ct. 763 (1983); Respondent's Exhibit No. 7 at 9-10.

34/ Because of the Court's holding regarding the third portion of the Castaneda standard, an analysis of the statistical method used to produce this figure will not be undertaken. See SHC at 42-43.

35/ Dobbs compared the grand jury pool that was in effect when he was indicted to the 1970 U.S. census figures for Walker County. The grand jury pool list was in effect from August 1972 until August 1974. See SHC at 31. The comparison thus was performed over a 24 month period.

36/ See note 15 supra.

APPENDIX "B"

Cir.1984). In another case we remanded for reconsideration because the trial court did not have the benefit of our recent opinions in this area. *DG Shelter Products Co. v. Forest Products Co.*, 769 F.2d 644 (10th Cir.1985). In *Shelter Products* we suggested that the trial court must expressly consider the alternative of attorney sanctions. *Id.* at 645.

In the case before us the record does not demonstrate any default other than failure to meet the trial court's deadline for a pretrial memorandum; the default appears to be that of the attorney; the trial court neither held a hearing nor invited responses as to what sanctions should be applied; it did not explain why dismissal was the most appropriate sanction.

We hold that, when a case is dismissed with prejudice or dismissed without prejudice at a time when the statute of limitations would ban refiling, a trial court must explain why it imposed the extreme sanction of dismissal. We realize, of course, that in the instant case the district court made its decision before we issued the opinions cited above to this effect. Thus the district court did not have the benefit of those rulings. We therefore consider it appropriate to reverse and remand for reconsideration in light of those cases.

IT IS SO ORDERED.

Wilburn DOBBS, Petitioner-Appellant, Cross-Appellee,

v.

Ralph KEMP, Respondent-Appellee, Cross-Appellant.

No. 84-8153.

United States Court of Appeals, Eleventh Circuit.

May 21, 1986.

State prisoner under sentence of death sought federal habeas corpus petition. The United States District Court for the Northern District of Georgia, Harold L. Murphy, J., finding that trial judge's instructions with regard to function of mitigating circumstances under Georgia death penalty statute were insufficient, set aside death sentence subject to state's right to reinstitute sentencing procedures, and state and petitioner appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) improper implication of prosecutor's closing argument that guilt beyond reasonable doubt is or should be permissive standard did not render trial fundamentally unfair; (2) admission of hearsay evidence did not render trial fundamentally unfair; (3) in-court identification of defendant was reliable; (4) impermissible burden-shifting instruction on issue of intent was harmless error; and (5) sentencing instructions concerning mitigating circumstances were not unconstitutional.

Reversed in part, affirmed in part and remanded.

1. Habeas Corpus ⇐45.2(6, 7)

Improper prosecutorial argument and evidentiary errors are grounds for granting writ of habeas corpus only when trial is rendered fundamentally unfair.

2. Criminal Law ⇐717

Prosecutor's statement during closing argument that "if you find that he didn't do it, or if you have a reasonable doubt, then you can acquit," improperly implied that guilt beyond reasonable doubt is or should be permissive standard.

3. Habeas Corpus ⇐45.2(7)

Prosecutor's improper statement that "if you find that he didn't do it, or if you have a reasonable doubt, then you can acquit him," was not of constitutional magnitude so as to require habeas corpus relief, where trial court had clearly and repeatedly instructed jury that jury had to find guilt beyond reasonable doubt, and guilt of defendant was overwhelming.

4. Habeas Corpus ⇐45.2(6)

Response "No, sir, but it had something to do with [different] hold-up" to defense counsel's question to accomplice as to whether particular car was involved in crime did not render trial fundamentally unfair so as to warrant habeas corpus relief, where statement did not explicitly accuse defendant of other crime, and even assuming jury had attributed so-called other holdup to defendant, it would have been very insignificant factor in light of overwhelming evidence of defendant's guilt.

5. Habeas Corpus ⇐45.2(6)

Erroneous state evidentiary ruling will be considered fundamentally unfair for habeas corpus purposes only if it concerns matter which is material in sense of crucial, critical, or highly significant factor.

6. Criminal Law ⇐706(2)

Testimony of daughter of witness, who identified defendant as perpetrator of crime in which she was severely beaten, that as she was visiting her mother at local hospital on afternoon following crime she saw man whom she later identified as defendant lurking around hospital was not necessarily in conflict with police officer's testimony that defendant was on used car lot on afternoon in question, and therefore, use of testimony was not unconstitutional on ground prosecutor knew or should have known that testimony was false.

7. Habeas Corpus ⇐45.2(6)

Testimony of owner of used car lot that defendant had paid him approximately $100 in $50 bill and assorted smaller bills on afternoon of murder, which was potentially incriminating because accomplice had indicated that accomplice had taken $50 bill from murder victim before defendant killed him, did not render defendant's prosecution for murder unfair for purposes of warranting habeas corpus relief even though owner's in-court statement was hearsay, where cross-examination revealing money was paid to owner's wife, and that owner only heard of payment from his wife, probably negated effect, if any, of hearsay.

8. Habeas Corpus ⇐45.2(7)

Trial court definition of term "aggravated assault," by reference to word assault, leaving jurors with somewhat circular definition, did not render trial fundamentally unfair so as to warrant habeas corpus relief, where indictments which were read aloud and taken to jury room defined both assault counts with great specificity.

9. Habeas Corpus ⇐45.3(1.50)

Petitioner could present his claim concerning improper identifications at trial in federal habeas corpus proceedings despite his failure to object at state trial, where at time of trial, Georgia law permitted defendant to raise federal constitutional claims in state habeas corpus proceedings in absence of knowing and intelligent waiver. Laws 1967, p. 835, § 1 et seq.

10. Criminal Law ⇐339.7(4)

Photographic identification procedures, in which one witness was shown four or five photographs, all of which were of defendant, and second witness was shown 12 photographs, four of which were of defendant and two of which were of white males, whereas defendant was black, were unduly suggestive.

11. Criminal Law ⇐339.10(2)

Although pretrial identification procedures were improperly suggestive, in-court identifications were reliable, where both witnesses identified defendant at trial without hesitation, both faced difficult cross-examinations which attempted to undermine reliability of their pretrial identifications, and both witnesses were in very close proximity to defendant during crime.

12. Criminal Law ⇐778(5), 823(9)

Jury instructions that acts of person of sound mind and discretion are presumed to be product of person's will, but that presumption could be rebutted, and that person of sound mind and discretion is presumed to intend natural and probable consequences of his acts, which presumption could also be rebutted, were unconstitutionally burden-shifting and not cured either by general instructions as to presumption of

innocence and burden of proof, or by more specific instruction that intent may be inferred from proof and circumstances, by acts and conduct, or when intent is natural and necessary consequence of act.

13. Criminal Law ⇐1172.2

Giving of impermissible burden-shifting instruction on intent was harmless error, where any reasonable doubt as to intent was negated by testimony that defendant struck assault victim several times prior to killing murder victim, shot at and missed bystander before firing fatal shot, and that murder was accomplished when defendant stood over victim, who had previously been ordered to lie on floor, and killed him by firing one shot into victim's stomach from close range.

14. Constitutional Law ⇐250.2(1)

Discriminatory selection of grand juries in state courts may be challenged under equal protection clause of Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

15. Constitutional Law ⇐224(4)

Underrepresentation of women on grand jury by 16.6% in two-year time period involved was in lower range of constitutional significance, and jury selection process pursuant to which jury commissioners took most recent voter registration lists and divided them equally, each commissioner screened list for deceased persons and eliminated them, and then acted completely mechanically in picking every fifth, sixth or tenth name from voter registration list was class neutral; thus, habeas corpus petitioner failed to make out prima facie case of grand jury discrimination.

16. Jury ⇐33(2.1)

Death qualification of jury did not violate defendant's constitutional rights by producing guilt prone jury which did not fairly represent cross section of community.

17. Jury ⇐108

Ambiguities in voir dire of juror did not indicate that her opposition to death penalty was unequivocal, but rather, indicated that she could never vote to impose death, where answer which seemed to indicate lack of opposition to death penalty in all circumstances actually indicated misunderstanding of question and belief that juror was in effect answering that she could never impose death penalty, and answer "If it was my family I would still," did not indicate juror would impose death penalty if member of family were crime victim, but rather, that even if member of her family were victim she would still be opposed to imposition of death; thus, exclusion of juror for cause was proper.

18. Homicide ⇐311

Sentencing instructions concerning mitigating circumstances were not constitutionally defective, where trial court allocated aggravation function to state and mitigation and extenuation function to defendant, clearly identified state's role to adduce aggravating evidence and argument and clearly indicated that such argument would be presented in support of death sentence, cast mitigating circumstances in opposition to aggravated circumstances, and court indicated that defense counsel's closing argument had been in support of mitigation and extenuation.

19. Criminal Law ⇐641.13(7)

Failure to put on mitigating evidence during sentencing phase was not ineffective assistance of counsel, but rather, constituted reasonable tactical judgment in light of defendant's poor reputation in community. U.S.C.A. Const.Amend. 6.

Robert Altman, Atlanta, Ga. (Court-appointed), for petitioner-appellant, cross-appellee.

Mary Beth Westmoreland, Atlanta, Ga., for respondent-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before RONEY and ANDERSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

CORRECTED OPINION

ANDERSON, Circuit Judge:

Appellant and cross-appellee, Wilburn Dobbs, is a Georgia prisoner currently under a sentence of death. In late 1980, he sought habeas corpus relief in the District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 2254. The district court denied relief on the basis of alleged constitutional errors in the guilt/innocence phase of Dobbs' trial. However, while rejecting several of Dobbs' claims concerning the sentencing phase of his trial, the district court granted relief on the ground that the trial judge's instructions with regard to the function of mitigating circumstances under the Georgia death penalty statute were insufficient. Thus, Dobbs' death sentence was set aside subject to the state's right to institute resentencing proceedings. Finally, the district court reserved ruling on six additional sentencing phase issues raised by Dobbs.[1]

The state appeals the death sentence relief granted by the district court. Dobbs also appeals, pressing his guilt/innocence phase claims, and urging affirmance of the relief which the district court granted with respect to the sentencing phase, and also urging affirmance of that relief on alternative grounds. Oral argument was held on September 17, 1984. The parties were notified that the decision would be withheld pending disposition of *Peek v. Kemp*, No. 82-8713, which was argued before the en banc court on June 11, 1985. In light of this court's recent en banc opinion in *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.1986) (en banc), we reverse the judgment of the district court which had granted the writ on the basis of the trial judge's instructions regarding the function of mitigating circumstances under the Georgia death penalty statute. We affirm in all other respects, but remand the case to the district court for consideration of the sentencing phase claims with respect to which it reserved decision.

PROCEDURAL HISTORY

On May 22, 1974, Dobbs was found guilty in the Superior Court of Walker County, Georgia of two counts of aggravated assault, two counts of armed robbery, and one count of murder.[2] Dobbs was sentenced to consecutive sentences of 10 years each on the aggravated assault conviction, to life imprisonment for each armed robbery conviction, and to death by electrocution for the murder conviction. Dobbs appealed the convictions and death sentence to the Georgia Supreme Court which affirmed in all respects. *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976), *cert. denied*, 430 U.S. 975, 97 S.Ct. 1667, 52 L.Ed.2d 370 (1977).

Then, in July 1977, Dobbs petitioned for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. After an evidentiary hearing, all requested relief was denied. *Dobbs v. Hopper*, No. 77-185 (Tattnall Sup.Ct., Oct. 9, 1979). Dobbs filed an application for probable cause to appeal the superior court ruling which was denied by the Georgia Supreme Court on

1. Since the district court had granted Dobbs relief from his death sentence, it did not review the following six sentencing phase issues raised by Dobbs: (1) whether the sentencing phase jury charge was constitutionally defective because it failed to limit the jury's discretion in imposing the death sentence; (2) whether the admission of Dobbs' prior convictions during the sentencing phase of his trial was constitutional error; (3) whether the trial judge's refusal to answer a question about the availability of parole during the sentencing deliberations was constitutional error; (4) whether the jury's verdict was constitutionally inadequate; (5) whether the fact that the [illegible] allegedly sentenced Dobbs to death [illegible] that Dobbs would not be executed constituted constitutional error; and (6) whether Dobbs' sentence of death was imposed as a result of passion, prejudice, or other arbitrary considerations.

2. The convictions arose out of a violent incident at a convenience store in Chickamauga, Georgia, on December 14, 1973. A summary of the evidence adduced at trial is well presented in the Georgia Supreme Court's opinion on direct review. *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976), *cert. denied sub nom., Dobbs v. Georgia*, 430 U.S. 975, 97 S.Ct. 1667, 52 L.Ed.2d 370 (1977). It is not necessary to review all the facts; those facts necessary to the adjudication of the issues presented will be supplied in the course of this opinion.

February 20, 1980. Dobbs sought a writ of certiorari in the United States Supreme Court which was also denied. *Dobbs v. Hopper*, 447 U.S. 930, 100 S.Ct. 3029, 65 L.Ed.2d 1125 (1980).

Additionally, while the state habeas petition was pending, Dobbs filed an extraordinary motion for a new trial. An evidentiary hearing was held, and a new trial was denied. *Georgia v. Dobbs*, No. 8403 (Walker Sup.Ct., Aug. 13, 1979). The Georgia Supreme Court affirmed, and the United States Supreme Court denied certiorari. *Dobbs v. State*, 245 Ga. 208, 264 S.E.2d 18, *cert. denied*, 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980).[3]

ISSUES

The following issues are presented to us on appeal:

(1) whether the following improprieties and evidentiary errors, individually and cumulatively, rendered Dobbs' trial fundamentally unfair under the Fourteenth Amendment: (a) prosecutor's improper closing argument at the guilt/innocence phase of the trial; (b) admission of evidence of another crime attributed to Dobbs; (c) introduction of testimony by prosecution which was known to be false and prejudicial; and (d) introduction of incriminating hearsay;

(2) whether the pre-trial identifications of Dobbs by two key witnesses were so suggestive as to unconstitutionally taint those witnesses' in-court identifications of Dobbs;

(3) whether the trial court's jury instruction unconstitutionally shifted the burden of proof to Dobbs as to the element of intent;

(4) whether the trial court's instruction as to the meaning of "assault" was improper and unconstitutional;

(5) whether the grand and traverse jury pools from which the jurors in Dobbs' case were selected were unconstitutionally composed;

(6) whether the process of "death qualifying" the jury under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), created a jury which was conviction-prone and not fairly representative of the community;

(7) whether a potential juror was improperly removed on *Witherspoon* grounds;

(8) whether the court's instructions regarding mitigating circumstances were constitutionally deficient;

(9) whether Dobbs' attorney provided ineffective assistance during the sentencing phase; and

(10) whether the failure to transcribe counsels' closing arguments during the sentencing phase was unconstitutional.

Each of these issues will be discussed in turn below.

I. WAS DOBBS' TRIAL FUNDAMENTALLY UNFAIR?

[1] Improper prosecutorial argument and evidentiary errors are grounds for granting a writ of habeas corpus only when the trial is rendered fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1973); *Shaw v. Boney*, 695 F.2d 528 (11th Cir.1983). We evaluate the following arguments pursuant to the fundamentally unfair standard.

A. *Prosecutor's Closing Argument at the Guilt Phase*

The state's attorney made the following closing argument at guilt/innocence trial:

> I don't know. I could stand up here and talk a long time, but I do say this, there's people that it just ain't safe to have on your streets, and there is people that ain't safe to have around you, and there's people that it ain't safe, your property ain't, your life ain't, and if this evidence hasn't demonstrated such a case, study about it.
>
> Of course, if you find that he didn't do it, or if you have a reasonable doubt, then you can acquit him.
>
> When you do that, he'll walk out the door with everybody else.
>
> Can you afford to take a chance?

[2] Dobbs argues that the above statement undermines the presumption of innocence and proper burden of proof required in a criminal trial. The state seems to admit that this statement was improper, but argues that it does not rise to the level of being fundamentally unfair. The prosecutor's statement was improper because it was a veiled implication that guilt beyond a reasonable doubt is or should be a permissive standard.

[3] The relevant precedents suggest that the statement is not of constitutional magnitude. "Prosecutorial remarks must be so prejudicial that they render the trial fundamentally unfair." *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1973); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir.1985) (en banc); *Cobb v. Wainwright*, 609 F.2d 754 (5th Cir.),[4] *cert. denied*, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 857 (1980); *Houston v. Estelle*, 569 F.2d 372 (5th Cir.1978).

In light of the obscurity of the improper implication, in light of the clear and repeated instructions to the jury from the trial court itself that the jury had to find guilt beyond a reasonable doubt, and in light of the overwhelming evidence of Dobbs' guilt, Dobbs has fallen woefully short of demonstrating that his trial was rendered fundamentally unfair.

B. *Admission of Evidence of "Prior Crime"*

In response to defense counsel's question to accomplice Walter Harris as to whether a particular car was involved in the crime, Harris answered: "No, sir, but it had something to do with Mr. Lemenick's hold-up." Immediately thereafter, defense counsel moved for a mistrial. The court refused to order a mistrial, but offered a curative instruction which defense counsel declined.

[4, 5] Although Georgia and federal law do not permit evidence of prior crimes except for limited purposes, the comment by Harris did not render the trial fundamentally unfair. As the district court indicated, the statement does not explicitly accuse Dobbs of a prior crime by any means. Even assuming that the jury attributed the so-called Lemenick hold-up to Dobbs, it would have been a very insignificant factor in the case. An erroneous state evidentiary ruling will be considered fundamentally unfair only if it concerns a matter which is "'material in the sense of a crucial, critical, highly significant factor.'" *Shaw v. Boney*, 695 F.2d 528, 530 (11th Cir.1983) (quoting *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir), *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976)).

C. *Testimony of Daisy Mae Yates*

[6] Grace Foster, a witness who identified Dobbs as the perpetrator at trial,[5] was beaten severely at the scene of the crime. Foster's daughter, Daisy Mae Yates, testified that she was visiting her mother at a local hospital the afternoon after the crime. She further testified that she saw a man whom she later identified as Dobbs lurking around the hospital. Dobbs claims this evidence was improperly admitted because it conflicted with a police officer's testimony as to where Dobbs was at the time in question. He claims this discrepancy in testimony was extremely prejudicial because it indicates that he was trying to kill Ms. Foster at the hospital. Dobbs also argues that the prosecution knew or should have known that Ms. Yates' testimony was

3. By virtue of the proceedings described in the text, Dobbs has exhausted all available state court remedies. *See* 28 U.S.C.A. § 2254(b).

4. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

5. *See infra* Part II.

false. *See Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967). We find no merit in these arguments.

In fact, as the district court opinion indicates, the testimony of Yates and the police officer do not necessarily contradict each other. The police officer's testimony simply places Dobbs at a used car lot at approximately 2:30 p.m., which does not, of course, preclude the possibility that Dobbs was at the hospital at another time during the afternoon. Prejudicial evidence, if relevant and not otherwise infected with evidentiary error, is generally admissible. If the jury chose to believe Yates, her testimony, no matter how interpreted, seems relevant.

Dobbs also contends that the prosecutor's use of the Yates' testimony was unconstitutional because the prosecutor knew or should have known that the testimony was false. However, he presents no evidence of this and, as indicated above, Yates' testimony is not necessarily inconsistent with other evidence presented by the state. Thus, we reject Dobbs' claim with regard to the testimony of Ms. Yates.

D. *Admission of Hearsay Testimony*

[7] At trial, Paul Young, an owner of a used car lot, stated that Dobbs paid him approximately $100 in a $50 bill and assorted smaller bills on the afternoon of the murder. This was potentially incriminating because accomplice Walter Harris' testimony indicated that Harris had taken a $50 bill from the murder victim before Dobbs killed him. Harris also testified that the money taken during the robbery, a total of $210, was split three ways, among Harris, Dobbs and another accomplice, after the crime. Upon cross-examination, defense counsel revealed that Young's in-court statement was hearsay because Dobbs had actually paid the $100 to Young's wife.

Dobbs claims that the "admission of such evidence ... was part of a blatant attempt to deny the petitioner a fundamentally fair trial. The testimony was an important element in the state's proofs." However, Dobbs does not elaborate further on the relative importance of this testimony nor does he cite any legal authority to support his claim.

In fact, given the other evidence adduced at trial, the hearsay probably had little or no effect. In addition, as the district court opinion pointed out, the cross-examination revealing that the money was paid to Young's wife, and that Young only heard of the payment from his wife, probably negated the effect, if any, of the hearsay. In any event, the admission was not of constitutional magnitude. *Shaw v. Boney*, 695 F.2d at 530–31 (evidence must be "crucial, critical, highly significant factor"; case involved double hearsay).

E. *Definition of the Word "Assault" in the Jury Instructions*

[8] In its instructions, the trial court defined the term "aggravated assault" by reference to the word "assault," leaving the jurors temporarily with a somewhat circular definition. However, the indictments which were read aloud and taken to the jury room defined both assault counts with great specificity. The indictment substantially clarified the circular instruction. In the context of the trial as a whole, the instruction, even if viewed as improper, did not conceivably render the trial fundamentally unfair. *Carrizales v. Wainwright*, 699 F.2d 1053, 1055 (11th Cir.1983).

F. *Cumulative Effect of Trial Errors*

None of the alleged errors, considered alone, approach the threshold standard of fundamental fairness. Taken together, their cumulative effect also falls far short of rendering Dobbs' trial fundamentally unfair.

II. IDENTIFICATION TESTIMONY OF EYE WITNESSES

At trial, witnesses William Austin and Grace Foster, who had been present at the scene of the crime, identified Dobbs as the perpetrator of the crime. Dobbs challenges these identifications as so unreliable as to violate due process.

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[9] As a threshold matter, the state argues that Dobbs' claim concerning improper identifications has been waived for failure to object at trial. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). However, at the time of Dobbs' trial in 1974, the relevant Georgia law, 1967 Ga.Laws p. 835, permitted a defendant to raise federal constitutional claims in state habeas corpus proceedings in the absence of a knowing and intelligent waiver by the defendant. *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986) (en banc). Since there is no allegation by the state that Dobbs relinquished his rights as contemplated by the Georgia statute then in effect, Dobbs may present his constitutional claim here.

On the merits, Dobbs argues that pre-trial photographic identifications of him made by Foster and Austin were impermissibly suggestive, rendering subsequent identifications at trial unreliable.

This circuit has adopted a two-step analysis in determining whether identifications such as the present ones are so unreliable as to violate due process. The court first must decide whether the original identification procedure was unduly suggestive. If so, the court must determine whether the procedure, given the totality of the circumstances, created a substantial risk of misidentification at trial. *United States v. Thevis*, 665 F.2d 616, 643 (5th Cir. Unit B), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982);[6] *see also Manson v. Braithwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

[10] The district court concluded that the photographic identifications were impermissibly suggestive. Foster was shown 4 or 5 photographs, all of which were of Dobbs. *Cf. Manson v. Braithwaite, supra* (use of only one picture, that of the defendant, found suggestive). Austin was shown 12 photographs, 4 of which were of Dobbs and 2 of which were of white males (Dobbs is black). We agree with the district court that the use of multiple photos of Dobbs in the pre-trial identifications was unduly suggestive. Showing witnesses a series of pictures of which several are the same person can only be a calculated method at narrowing the witnesses' choice with regard to identification.

[11] The lower court, however, while holding the pre-trial procedure improperly suggestive, found that the identifications were reliable because of the witnesses' very close proximity to the perpetrator during the crime and the certainty with which the identifications were given at trial. *See id.* at 114, 97 S.Ct. at 2253 (citing these and other factors as evidence of reliability despite suggestive identification procedures). After a careful review of the trial record, we agree with the district court that the identifications were reliable.

Both Austin and Foster identified Dobbs at trial without hesitation. They both faced difficult cross-examinations[7] which attempted to undermine the reliability of their pre-trial identifications by, in part, challenging their physical and emotional capacities to observe and remember the events which transpired. However, their testimony indicates that they in fact accurately observed Dobbs during the course of the crime. Moreover, as the district court indicated, it is significant that both Foster and Austin were in very close proximity to Dobbs during the crime. Foster had the opportunity to observe Dobbs for a considerable period of time. While Austin only saw Dobbs for a "split second," we are convinced that the other factors present render his, as well as Foster's, in-court identification highly reliable.

6. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. *Id.* at 34.

7. Foster was cross-examined on this issue during a pre-trial hearing. Austin was cross-examined at trial.

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Having found that Dobbs has not met the standard for finding a pre-trial identification violative of due process, *United States v. Thevis*, 665 F.2d at 643, we affirm the decision of the district court in this regard.

III. SANDSTROM ISSUES

[12] The district court found that the trial judge's instruction regarding intent was impermissibly burden-shifting under *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The relevant instruction is as follows:

> I charge you that a crime is a violation of a statute of this state in which there shall be a union of joint operation of act and intention. I further charge you that the acts of a person of sound mind and discretion are presumed to be the product of the person's will, but this presumption may be rebutted. I charge you that a person of sound mind and discretion is presumed to intend the natural and probable consequences of his act, but this presumption may be rebutted.
>
> As to intent, I charge you that the intent to commit the crimes charged in this bill of indictment is an essential element that the state must prove beyond a reasonable doubt. Intent is always a question for the jury and is ordinarily ascertained by act and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before them.
>
> Intent may be inferred from the proof and circumstances or by acts and conduct or it may be presumed when it is the natural and necessary consequences of the act.

The first paragraph of the above-quoted instruction is identical to the mandatory rebuttable burden-shifting instruction which was disapproved by the Supreme Court in the recent case of *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

The state argues that the instruction that intent "*may* be inferred from the proof and circumstances or by acts and conduct or it *may* be presumed when it is the natural and necessary consequences of the act" is curative of the impermissible burden-shifting instruction. This instruction is a permissive presumption and, standing alone, it is constitutionally adequate. *See Lamb v. Jernigan*, 683 F.2d 1332, 1336–40 (11th Cir. 1982), *cert. denied*, 460 U.S. 1024, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). However, when given in conjunction with the unconstitutionally burden-shifting instruction, the otherwise permissible instruction fails to cure. The situation here is similar to that in *Franklin* where an instruction that "'*criminal* intention may not be presumed,'" *Franklin*, — U.S. at —, 105 S.Ct. at 1974, 85 L.Ed.2d at 357 (emphasis in original), was held not to cure the burden-shifting instruction. *Id.* at —, 105 S.Ct. at 1975, 85 L.Ed.2d at 358 ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict"); *accord Davis v. Kemp*, 752 F.2d 1515, 1518–19 (11th Cir.) (en banc), *cert. denied*, — U.S. —, 105 S.Ct. 2689, 86 L.Ed.2d 707 (1985); *cf. Brooks v. Kemp*, 762 F.2d 1383, 1388–90 (11th Cir.1985) (en banc) (rejecting argument that instruction that "intent may be presumed" cured a mandatory rebuttable burden-shifting instruction as to malice, i.e., intent in the absence of provocation or justification, because "[a]t best, the contradictory instructions as to intent and malice may have confused the jury as to the proper burden of proof").

For much the same reason, we reject the state's argument that the general instructions as to presumption of innocence and burden of proof, and as to the state's proving intent beyond a reasonable doubt, cure the constitutional error. The *Sandstrom* court rejected this argument with respect to substantially identical allegedly curative instructions. 442 U.S. at 518 n. 7, 99 S.Ct. at 2456 n. 7 (the jury could have interpreted the conflicting instructions "as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied"); *see also Franklin*, — U.S. at —, 105 S.Ct. at 1974, 85 L.Ed.2d at 357.

After a careful review of the entire jury charge, we find that a reasonable jury could well have concluded that Dobbs bore the burden of proof on the necessary element of intent. We thus conclude that the instruction violates *Sandstrom*.

The state maintains that, even if there was a *Sandstrom* error in this case, it was harmless. Dobbs argues that *Sandstrom* errors can never be considered harmless, but cites only the plurality opinion in *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983). The Supreme Court has recognized the plurality's position in *Connecticut v. Johnson* and expressly left open the question whether a *Sandstrom* error can ever be harmless. *Francis v. Franklin*, — U.S. at —, 105 S.Ct. at 1977, 85 L.Ed.2d at 360. Moreover, our en banc court in several recent cases has reaffirmed for this circuit that a *Sandstrom* error, like most other errors of constitutional magnitude, can be held harmless beyond a reasonable doubt. *Brooks v. Kemp*, 762 F.2d at 1390; *Drake v. Kemp*, 762 F.2d 1449, 1453 (11th Cir. 1985) (en banc); *Tucker v. Kemp*, 762 F.2d 1496, 1501 (11th Cir.1985) (en banc); *Davis v. Kemp*, 752 F.2d at 1520–21; *McCleskey v. Kemp*, 753 F.2d 877, 902 (11th Cir.1985) (en banc). Thus, we consider the evidence presented at trial to determine whether the *Sandstrom* error was harmless beyond a reasonable doubt.

Dobbs argues that the *Sandstrom* error here was harmful. He cites his trial attorney's testimony in the federal habeas proceeding below to the effect that Dobbs' conduct was probably impulsive. However, the district court seems to have discounted this evidence, relying instead on the otherwise overwhelming evidence as to Dobbs' presence in the store and role as triggerman. The district court's analysis misses the mark because a harmless error analysis under *Sandstrom* should focus on the element of intent. *Francis v. Franklin*, — U.S. at —, 105 S.Ct. at 1977, 85 L.Ed.2d at 360; *Connecticut v. Johnson*, 460 U.S. at 86, 103 S.Ct. at 977 (plurality opinion); *id.* at 90, 96, 97, 99, 101, 103 S.Ct. at 979, 982, 983–84, 985 (Powell, J., dissenting); *Davis v. Kemp*, 752 F.2d at 1520 & n. 10. The fact that Dobbs was the triggerman is not conclusive of intent.[8]

The state argues that Dobbs presented no evidence at trial as to lack of intent since his defense was exclusively one of alibi. The fact that Dobbs' defense was one of alibi, although relevant to the analysis,[9] is not conclusive because the state has the burden of proving each element, intent included, beyond a reasonable doubt.

[13] Nevertheless, we conclude that the evidence in the record negates any reasonable doubt as to intent. The trial testimony indicates that Dobbs struck Grace Foster several times prior to the killing of Roy

8. For example, if there was credible evidence in the trial record that Dobbs had pulled the trigger impulsively or accidentally, a reasonable doubt as to intent might well be raised.

   The fact that there was overwhelming evidence that Dobbs was the triggerman does, however, eliminate the need to undertake the analysis pursued in *Drake v. Kemp*, 762 F.2d 1449, 1453–57 (11th Cir.1985) (en banc). Although there was overwhelming evidence in *Drake*, as in this case, that the actual killer intended to kill, because the theory that Drake was liable as an aider and abetter also had been submitted to the jury, the appellate court could not tell whether the jury had found that Drake was the actual killer or, on the other hand, whether he was merely an aider and abetter. In this case, although the accomplice liability theory was included in the jury instructions, there was overwhelming evidence that Dobbs was the triggerman. Thus, we can readily conclude that the jury found that Dobbs was the actual killer. Moreover, since there was overwhelming evidence that the actual killer intended to kill, *see* discussion in text *infra*, the *Sandstrom* error was harmless.

9. *See Davis v. Kemp*, 753 F.2d 1515, 1521 (11th Cir.1985) (en banc) ("The defense presented by Davis was non-participation. The intent of the person or persons committing the crime was not a contested issue. Under these circumstances, the doctrine of harmless error is most appropriate.").

Sizemore, the murder victim. Dobbs also shot at (and missed) a bystander, William Austin, before firing the fatal shot at Sizemore.[10] Then, according to Foster's eyewitness testimony, Dobbs stood over Sizemore, who had previously been ordered by Dobbs to lie on the floor, and killed him by firing one shot into Sizemore's stomach from close range. Finally, before leaving the scene, Dobbs struck Foster in the head with the butt of his shotgun, rendering her unconscious.

The testimony of two other witnesses largely corroborates Foster's account of the incident. One of Dobbs' accomplices, Walter Lee Harris, testified to the same general sequence of violent events as did Foster, although he did not actually see the Sizemore killing. His testimony indicates as well that Dobbs was the mastermind of the crime.[11] Austin's testimony also corroborates Dobbs' assaultive behavior prior to the Sizemore killing.

The evidence described above indicates a series of purposeful and violent assaults on three individuals, including the killing of a defenseless man at close range. The overwhelming evidence negates any possibility that Dobbs was acting impulsively or otherwise unintentionally. Thus, we affirm the district court's finding that the *Sandstrom* error was harmless beyond a reasonable doubt.

In addition, Dobbs argues that the failure to transcribe his defense attorney's closing argument after the guilt/innocence phase of his trial makes review of the *Sandstrom* error impossible. Dobbs does not elaborate upon this argument, but presumably he feels that his attorney, Donald Bennett, may have actually argued or hinted at lack of intent during his closing argument. Bennett testified at the federal habeas proceeding to the effect that his closing argument during the *sentencing* phase of the trial probably stressed that Dobbs' conduct during the crime was impulsive.

Bennett did not testify that his closing argument during the guilt/innocence phase of the trial similarly dealt with lack of intent and, of course, any argument during the sentence phase is irrelevant to the *Sandstrom* issue. Since Dobbs makes no showing whatsoever that lack of intent was argued during the guilt/innocence phase,[12] we hold that the failure to transcribe the closing argument did not prejudice Dobbs.

IV. COMPOSITION OF GRAND AND TRAVERSE[13] JURIES

The state argues that Dobbs has waived this issue for failure to make timely objection. This claim of waiver is controlled by the discussion in Part II, *supra*. Because at the time of Dobbs' trial in 1974, the relevant Georgia law permitted a defendant to raise federal constitutional claims in state habeas corpus proceedings in the absence of a knowing and intelligent waiver, and because the state does not assert such a waiver, Dobbs did not waive his right to assert claims concerning jury composition. *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986) (en banc).

10. There is a slight conflict in the testimony here. Foster testified that Dobbs fired at Austin after firing the fatal shot at Sizemore. Austin testified, however, that the first shot was fired at him. This discrepancy is not relevant to an intent inquiry and, thus, does not affect our harmless error analysis under *Sandstrom*.

11. Harris' testimony was later recanted. The Georgia Supreme Court rejected Dobbs' extraordinary motion for a new trial which was in part based on Harris' recantation. *Dobbs v. State*, 245 Ga. 208, 264 S.E.2d 18, *cert. denied*, 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980).

12. It is highly unlikely that Bennett would have argued lack of intent, i.e., impulsiveness, at the close of the guilt/innocence phase because he had based his entire defense of Dobbs to that point on alibi.

13. In the headings of his various briefs and pleadings, Dobbs seems to indicate a claim concerning the composition of the traverse jury. However, Dobbs makes no specific arguments concerning the traverse jury. To avoid any present or future confusion, any implicit argument concerning the traverse jury is deemed abandoned because Dobbs has presented no evidence in this regard.

[14] Dobbs challenges the selection process and composition of the grand jury venire with respect to women. Discriminatory selection of grand juries in state courts may be challenged under the Equal Protection Clause of the Fourteenth Amendment. *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); *Gibson v. Zant*, 705 F.2d 1543, 1546 (11th Cir.1983). In order to make out a prima facie case of grand jury discrimination, Dobbs must generally present evidence of the following three factors:

> First, the group allegedly discriminated against must be one that is a distinct class in society. Second, the group must be substantially underrepresented in the grand jury venires ... over a significant period of time. Third, the defendant must show that the selection procedure is not racially neutral or is susceptible to abuse as a tool of discrimination.

Bryant v. Wainwright, 686 F.2d 1373, 1375–76 (11th Cir.1982), *cert. denied*, 461 U.S. 932, 103 S.Ct. 2096, 77 L.Ed.2d 305 (1983), citing *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977).

Evidence of grand jury discrimination was presented at the state habeas corpus hearing. Dobbs met the first part of the prima facie test because women have been held to constitute a recognizable and distinct class. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Gibson v. Zant*, 705 F.2d at 1547. In addition, Dobbs submitted proof of underrepresentation of women on the grand jury venire in Walker County, Georgia, the county in which Dobbs was indicted and tried. Dobbs presented the grand jury lists from which the grand jurors who indicted him were picked. Those lists were marked with an "M" next to male names and a "F" next to female names. Assuming a population of 50% women, the district court found that women were underrepresented on the grand jury venire by 16.6%. Our review of the evidence presented to the state habeas court and of the district court's interpretation of that evidence, indicates that the 16.6% disparity accurately reflects the underrepresentation of women on the Walker County grand jury venire. Furthermore, we agree with the district court that this degree of underrepresentation is constitutionally significant, *see, e.g., Hernandez v. Texas*, 347 U.S. 475, 480–81, 74 S.Ct. 667, 671–72, 98 L.Ed. 866 (1954) (14%); *Birt v. Montgomery*, 709 F.2d 690, 699 (11th Cir. 1983) (17.6%), *vacated*, 725 F.2d 587 (11th Cir.1984) (en banc) (decided on other grounds), although it is in the lower range found significant in prior cases. We also agree with the district court that Dobbs has shown underrepresentation "over a significant period of time." *Bryant v. Wainwright*, 686 F.2d at 1376. The data used by Dobbs spanned two years which falls within the lower range of time periods which the courts have found significant. *See Machetti v. Linahan*, 679 F.2d 236, 241–42 (11th Cir.1982) (20-month period), *cert. denied*, 459 U.S. 1127, 103 S.Ct. 763, 74 L.Ed.2d 978 (1983).

With regard to the third portion of the prima facie case, Sidney Porter, a jury commissioner for Walker County, testified as to how the grand jury lists for Walker County were compiled during the period in question. He stated that the jury commissioners, Porter himself and five others, took the most recent voter registration lists and divided them up equally. Each commissioner then screened the list for deceased persons and eliminated them. Then, the commissioner acted in a completely mechanical fashion. He or she picked every 5th, 6th or 10th name from the voter registration list. The names picked were then placed on the grand jury venire. No other selection criteria were used and the superior court judges played no role in the selection or composition of the grand jury venire. The process described by jury commissioner Porter, which is unrebutted by Dobbs, does not reflect systemic abuse or non-neutral selection criteria. *Cf. Bryant v. Wainwright*, 686 F.2d at 1378 (rejecting argument that the use of voter registration lists as a source for grand jury venires is, in itself, a tool of discrimination).

[15] Since both the underrepresentation of women and the time period thereof are in the lower range of constitutional significance, and since the selection procedure employed was class neutral and mechanically applied,[14] we conclude that Dobbs has failed to make out a prima facie case of grand jury discrimination.

V. VOIR DIRE ISSUES

A. *"Death Qualified" Jury as Guilt Prone?*

[16] Dobbs argues that the "death qualification" of the jury in his case under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), produced a guilt prone jury which did not represent a cross-section of the community. The Supreme Court has rejected this argument. *Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, 89 L.Ed.2d — (U.S.1986). Accordingly, the district court's decision declining to grant the writ on the basis of this claim is affirmed.

B. *Witherspoon Exclusion of Juror Mitchell*

[17] Dobbs challenges the exclusion of a juror, Virginia Mitchell, stating that on voir dire her opposition to the death penalty was not unequivocal and complete as required by *Witherspoon*. At issue is the following colloquy between the trial judge and Ms. Mitchell:

> THE COURT: Now, Mrs. Mitchell, you said you were conscientiously opposed to capital punishment, that means inflicting the death penalty?
>
> MRS. MITCHELL: Yeah.
>
> THE COURT: Are your convictions and your opposition to that so fixed and so firm and so ingrained in you that you would never under any circumstances vote to impose the death penalty?
>
> MRS. MITCHELL: No.
>
> THE COURT: Is it so strong that you would ever refuse to consider imposing the death penalty?
>
> MRS. MITCHELL: If it was my family I would still.
>
> THE COURT: It wouldn't matter how severe the evidence might show a case to be, you would still refuse to invoke the death penalty?
>
> MRS. MITCHELL: Yes, sir.
>
> THE COURT: I'm going to let her off for cause.

There are two alleged ambiguities in the above colloquy. Ms. Mitchell's second answer would indicate lack of opposition to the death penalty in all circumstances if taken in isolation. However, given Ms. Mitchell's other answers, all reflecting opposition to the death penalty, it is clear that Ms. Mitchell misunderstood the question and was under the impression that she was again indicating unequivocal opposition to the death penalty. The trial judge's next question reveals his understanding that Ms. Mitchell was answering, in effect, that she would never impose the death penalty under any circumstances. The trial judge's understanding is reasonable, and is entitled to deference. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (determination by state trial judge to exclude juror for "cause" under *Witherspoon* is a finding of fact to be accorded a presumption of correctness on habeas review under 28 U.S.C.A. § 2254(d)). Ms. Mitchell's third answer that "if it was my family I would still" does not indicate that she would impose the death penalty if a member of her family were a crime victim; rather, the use of the word "still" indicates that even if a member of her family were a victim she would still be opposed to the imposition of death. Therefore, we affirm the district court's decision that the *Witherspoon* exclusion of juror Mitchell was proper.

14. We need not decide whether the failure to satisfy the third prong of the test, *i.e.*, defective selection procedure, would always operate as a per se bar to the establishment of a prima facie case. The ultimate "goal of this entire balancing process is ... to eliminate chance or inadvertence as a cause of the disparity; the statistical evidence must convince the court that discrimination is the only reasonable explanation ..." of underrepresentation. *Bryant v. Wainwright*, 686 F.2d 1373, 1377 (11th Cir. 1982). Here, as in *Bryant*, the statistical underrepresentation is in the low range of disparities which have been accorded constitutional significance. That being the case, "[a] selection process which can be easily maneuvered in a discriminatory fashion is more likely to give rise to a presumption of discrimination than a selection process which would be difficult, but not impossible, to manipulate." *Id.* As discussed in the text, *supra*, the selection process used in this case was not subject to manipulation in a discriminatory fashion, but rather was neutral and mechanical in its application. *Compare Castenada v. Partida*, 430 U.S. 482, 494 n. 13, 97 S.Ct. 1272, 1280 n. 13, 51 L.Ed.2d 498 (1977) ("if a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.").

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VI. SENTENCING CHARGE REGARDING MITIGATING CIRCUMSTANCES

The district court granted the writ of habeas corpus with regard to the death sentence imposed upon Dobbs, holding that the sentencing instruction concerning mitigating circumstances was unconstitutional under *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir.1983). In *Peek v. Kemp*, 784 F.2d 1479, 1494 (11th Cir.1986) (en banc), this court overruled *Westbrook* to the extent it is inconsistent with *Peek*. The *Peek* court rejected "the notion that the Constitution requires that the jury instructions include any particular words or phrases to define the concept of mitigation or the function of mitigating circumstances. It is sufficient from a constitutional standpoint if it is clear from the entire charge considered in context that a reasonable jury could not have misunderstood the meaning and function of mitigating circumstances." *Id.*

The sentencing judge in *Peek* had given an instruction authorizing the jury to "'consider the facts and circumstances, if any, in extenuation, mitigation or aggravation of punishment.'" 784 F.2d at 1489. The court held that, while the sentencing instruction quoted above might not, standing by itself, adequately instruct the sentencing jury on the nature and function of mitigating circumstances, a "common sense evaluation of the proceedings in this case indicates that no reasonable juror could have failed to understand the challenged instructions and the role of mitigation." *Id.* at 1486; *see Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

In the instant case, examining the entire charge in context, as required by *Peek*, it is clear that no reasonable juror could have misunderstood the meaning and function of mitigating circumstances. In language virtually identical to that used in *Peek*, the trial court made the following statement:

> in arriving at this determination you are authorized to consider all of the evidence received here in Court presented by the State and the defendant throughout the trial before you, you are authorized to consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment, however, it is not essential to your decision that you find extenuating or mitigating facts and circumstances on the one hand or facts and circumstances in aggravation on the other.

Trial Transcript at 504-05. Although this statement did not define the meaning of "mitigation" or "extenuation" and did not allocate the mitigating and aggravating functions to the parties, "it did indicate clearly by use of the terms 'on the one hand' and 'on the other,' that the concepts of mitigation (or extenuation) and aggravation are opposite concepts, thus indicating that the 'facts and circumstances' relevant to these concepts would be presented for opposing purposes by the opposing parties." *Peek*, 784 F.2d at 1490.

Shortly thereafter, the judge explained to the jury:

> The State and the defendant both will have the opportunity, if they see fit to do so, to go forward and present evidence in aggravation or evidence of mitigation or extenuation, and at this point I ask the State if you have anything in aggravation in these cases.

Trial Transcript at 506. After the state had introduced evidence of three prior con-

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victions and counsel for both sides had made their closing arguments, the trial judge made this statement to the jury:

> Ladies and gentlemen, in this presentence investigation and the trial of this case, you have had evidence presented for your consideration by the State in aggravation, you have had argument by the State in aggravation, or what he contends is aggravation, and you have heard argument by counsel for the defendant in mitigation and extenuation.

Id. at 507. In addition, other instructions cautioned the jury that they were not authorized to recommend the death sentence unless they first found "beyond a reasonable doubt ... one of the aggravating circumstances which the Legislature has provided." *See, e.g.*, Trial Transcript at 511. The trial judge also described the particular statutory aggravating circumstance argued by the state, i.e., that the crime was committed while the defendant was engaged in the commission of another capital felony. *Id.* at 512. Moreover, the trial judge told the jury "you are not bound to sentence him to death even though you find there is an aggravating circumstance which the Legislature saw fit for a jury to consider." *Id.* at 516.

[18] The above-quoted passages explicitly allocate the "aggravation" function to the state and the "mitigation and extenuation" function to the defendant. Thus, these statements clearly identified the state's role to adduce aggravating evidence and argument, and clearly indicated that such evidence and argument would be presented in support of the death sentence. Because the instructions cast mitigating circumstances in opposition to aggravating circumstances, and because the court clearly indicated that defense counsel's closing argument had been in support of mitigation and extenuation, we are satisfied that no reasonable juror could have misunderstood that it was the defendant's role to present mitigating evidence and argument, and that such evidence and argument would be presented in support of mercy, i.e., a life sentence. Considering the entire charge in context, we are confident that no reasonable juror could have misunderstood the nature and function of mitigating circumstances and its own role in evaluating mitigating evidence and argument. Thus, in light of *Peek*, the trial court's jury instructions were not constitutionally deficient.

We therefore reverse the district court's grant of the writ of habeas corpus with regard to Dobbs' death sentence.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING PHASE

Dobbs maintains that his trial counsel, Donald Bennett, provided ineffective assistance in the sentencing phase of the trial. Dobbs outlines in detail many avenues of investigation with regard to mitigating evidence which he maintains were open to Bennett during the sentencing phase. He has included with his federal habeas petition affidavits from 19 individuals which attest to Dobbs' good character and the fact that they would have testified in Dobbs' behalf if they had been contacted at the time of the trial. While conceding that Bennett may have done a better job in developing mitigating evidence, the district court found that Bennett "performe[d] a reasonably substantial investigation." Our review of the record and Bennett's testimony during the federal habeas proceeding, lead us to agree that Bennett's investigation was adequate. *Cf. Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, 395 (1984) ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness, applying a heavy measure of deference to counsel's judgments.").

[19] The district court concluded, in addition, that Bennett's decision not to put on any mitigating evidence during the sentencing phase was a reasonable tactical judgment. Knowing of Dobbs' poor reputation in the community, Bennett testified in the district court that he did not want to put on any "positive" character testimony for fear that it would not be persuasive and would

prompt damaging counter evidence from the prosecution. After reviewing the record, we agree with the district court's finding that Bennett's failure to put on mitigating evidence was a tactical judgment, and was not, as Dobbs maintains, based on a fear that he would be rebuffed by the trial judge. We cannot say that Bennett's decision not to present mitigating evidence was unreasonable.[15] *See generally Strickland v. Washington*, 466 U.S. at 684–91, 104 S.Ct. at 2063–67, 80 L.Ed.2d at 691–96. Therefore, we affirm the district court's conclusion that Bennett exercised reasonable professional judgment and rendered effective assistance of counsel.

VIII. FAILURE TO TRANSCRIBE CLOSING ARGUMENTS

Dobbs argues that the state's failure to transcribe closing arguments during the sentencing phase made proper review of the record impossible, thereby creating a "substantial risk that the penalty is being inflicted in an arbitrary and capricious manner," citing *Stephens v. Zant*, 631 F.2d 397, 403 (5th Cir.1980), *modified*, 648 F.2d 446 (5th Cir. Unit A June 19, 1981), *rev'd on other grounds*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Dobbs suggests that the transcript is necessary to properly evaluate several claims including his *Sandstrom* claim, and his ineffective assistance of counsel claim. However, we have concluded in Part III, *supra* that the absence of the transcript does not assist Dobbs' *Sandstrom* claim, and our analysis in Part VII, *supra*, indicates that the transcript would not reveal ineffectiveness.

Dobbs also maintains that given the impropriety of the prosecutor's closing argument during the guilt/innocence phase,[16] the Constitution requires that his sentencing argument be scrutinized as well. In the habeas proceeding below, the court considered evidence from Dobbs' trial attorney and the court reporter, and concluded that there was no suggestion that the prosecutor's closing argument was inflammatory. Our review of the record leads us to the same conclusion. Therefore, we affirm the district court's decision in this regard. *See Corn v. Zant*, 708 F.2d 549, 560 (11th Cir. 1983) ("Absent any showing of harm by petitioner, it is settled that failure to transcribe counsel's arguments is not a constitutional violation requiring vacation of a death sentence."), *cert. denied*, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984).[17]

CONCLUSION

For the foregoing reasons, the district court's judgment is reversed with respect to the instructions on mitigating circumstances, affirmed in all other respects, and remanded to the district court for consideration of the sentencing phase claims with respect to which it reserved decision.

REVERSED in part, AFFIRMED in part and REMANDED.

15. Although Bennett did not present any mitigating evidence, his testimony in the district court reveals that he did make a closing argument in mitigation.

16. *See supra* Part I.A.

17. *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *modified*, 648 F.2d 446 (5th Cir. Unit A June 19, 1981), *rev'd on other grounds*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), cited by Dobbs in support of his "failure to transcribe" argument, is not supportive; if anything, it favors the state's position because it implies that petitioner must make some showing of prejudice in order to prevail. 631 F.2d at 402–04.

This too violates *Stephens* because it introduces questions of general applicability not related to the proper task of the jury: to render an individualized determination in the case at hand. 462 U.S. at 879, 103 S.Ct. at 2743. The prosecutor here sought to induce the jury to strike a blow against crime and for deterrence by making an example of Moore. This is impermissible and unfair; it rises to the level of reversible error. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974); *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); *Brooks*, 762 F.2d at 1399.

I believe Moore has stated three further bases for relief. It was clear error to introduce the testimony of Ms. Allen's father because it was completely irrelevant and extraordinarily prejudicial. It was a grave, gross error for the prosecutor to invite the jury to weigh the comparable worth of the two lives. The error was compounded by the prosecutor's invitation to the jurors to make the streets safe again by putting Carzell Moore to death.

For the reasons foregoing, I must enter a partial dissent from the majority's disposition of this appeal.

Wilburn DOBBS, Petitioner-Appellant, Cross-Appellee,

v.

Ralph KEMP, Respondent-Appellee, Cross-Appellant.

No. 84-8153.

United States Court of Appeals, Eleventh Circuit.

Jan. 23, 1987.

State prisoner under sentence of death sought federal habeas corpus relief. The United States District Court for the Northern District of Georgia, No. C80-247R, Harold L. Murphy, J., set aside death sentence subject to state's right to reinstitute sentencing procedures, and state and prisoner appealed. The Court of Appeals, 790 F.2d 1499, reversed in part, affirmed in part and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals held that defendant failed to establish prima facie equal protection violation through underrepresentation of women on grand jury.

Opinion modified in part and petition denied.

1. Habeas Corpus ⇐45.3(1.50)

Defendant did not waive right to assert claims concerning composition of grand jury on petition for habeas corpus by failing to object at trial, because, at time of trial, Georgia law permitted defendant to raise federal constitutional claims in state habeas corpus proceedings absent knowing and intelligent waiver, and because state did not assert waiver.

2. Constitutional Law ⇐250.2(1)

Discriminatory selection of grand juries in state courts may be challenged under equal protection clause of Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐224(5)

Defendant, whose attorney went through names on grand jury list and, based on first name, determined that 221 men and 117 women were on list, failed to establish prima facie equal protection violation through underrepresentation of women, where proffered evidence pertained to selection of only single grand jury pool, and where attorney marked ambiguous names as female and designated persons as male if two initials were used in lieu of first name. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐224(5)

Establishing that women are underrepresented on single grand jury list by some undetermined amount is not sufficient to establish prima facie equal protection violation. U.S.C.A. Const.Amend. 14.

Robert Altman (court-appointed), Atlanta, Ga., for petitioner-appellant, cross-appellee.

Mary Beth Westmoreland, Atlanta, Ga., for respondent-appellee, cross-appellant.

Appeals from the United States District Court for the Northern District of Georgia.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 21, 1986, 11 Cir., 790 F.2d 1499).

Before RONEY, Chief Judge, and ANDERSON, Circuit Judge, and MORGAN, Senior Circuit Judge.

PER CURIAM:

In Part VI of the opinion, entitled Sentencing Charge Regarding Mitigating Circumstances, the opinion as previously published is amended by adding a footnote following the phrase "the trial court's jury instructions were not constitutionally deficient," which phrase appears at 790 F.2d at 1513. The added footnote is as follows:

> At trial no objection was made challenging the lack of clarity of the instructions in this regard, providing further support for our conclusion that the instructions adequately conveyed the meaning and function of mitigating circumstances. *Peek*, 784 F.2d at 1493. Moreover, we note that the evidence in this case included very little in the way of mitigating circumstances. During collateral proceedings, Dobbs trial counsel testified that he had looked diligently but without success for mitigating evidence, but that at sentencing he would have argued against the death penalty, and probably had argued that the shooting was impulsive.

[1-4] Although in his petition for rehearing Dobbs has not challenged Part IV of the opinion as previously published, the court *sua sponte* vacates Part IV and substitutes the following in lieu thereof:

IV. COMPOSITION OF GRAND AND TRAVERSE[1] JURIES

The state argues that Dobbs has waived this issue for failure to make timely objection. This claim of waiver is controlled by the discussion in Part II, *supra*. Because at the time of Dobbs' trial in 1974, the relevant Georgia law permitted a defendant to raise federal constitutional claims in state habeas corpus proceedings in the absence of a knowing and intelligent waiver, and because the state does not assert such a waiver, Dobbs did not waive his right to assert claims concerning jury composition. *Spencer v. Kemp*, 781 F.2d 1458 (11th Cir. 1986) (en banc).

Discriminatory selection of grand juries in state courts may be challenged under the Equal Protection Clause of the Fourteenth Amendment. *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); *Gibson v. Zant*, 705 F.2d 1543, 1546 (11th Cir.1983). In order to make out a prima facie case of grand jury discrimination, Dobbs must generally present evidence of the following three factors:

> First, the group allegedly discriminated against must be one that is a distinct class in society. Second, the group must be substantially underrepresented in the grand jury venires ... over a significant period of time. Third, the defendant

1. In the headings of his various briefs and pleadings, Dobbs seems to indicate a claim concerning the composition of the traverse jury. However, Dobbs makes no specific arguments concerning the traverse jury. To avoid any present or future confusion, any implicit argument concerning the traverse jury is deemed abandoned because Dobbs has presented no evidence in this regard.

must show that the selection procedure is not racially neutral or is susceptible to abuse as a tool of discrimination.

Bryant v. Wainwright, 686 F.2d 1373, 1375–76 (11th Cir.1982), *cert. denied*, 461 U.S. 932, 103 S.Ct. 2096, 77 L.Ed.2d 305 (1983) (citing *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977)).[2]

Dobbs challenges the selection process and composition of the grand jury venire with respect to women. Evidence of grand jury discrimination was presented at the state habeas corpus hearing. The evidence presented by Dobbs with respect to this issue was extremely sparse. In its entirety, it consisted of the testimony of Sidney Porter, Jr., who was one of the jury commissioners in Walker County, Georgia; an exhibit which listed the names of the persons on the grand jury pool which was in effect at the time Dobbs was indicted; and an exhibit showing the 1970 population of Walker County revealing that, counting persons of all ages, there were 24,735 males and 25,956 females. In addition, Dobbs' attorney stated in his place that he had gone through the names on the grand jury list and, based on the first name, determined in his own mind whether the persons were male or female, and accordingly designated each person on the list as either "M" or "F". The attorney stated that if he thought the name were ambiguous he would mark it as being female, except that when there were merely two initials in lieu of a first name, he would designate the person as male. In this manner he counted 117 women on the list, or 34.6%, and 221 men on the list, or 65.4%. Porter's brief and sometimes confusing testimony established that the jury commissioners selected persons at random (e.g., selecting every tenth name) directly from the voter registration list.

We are aware of no cases in which either the Supreme Court or this court has accepted such meager evidence as a prima facie case. First, we are concerned with the treatment of all names consisting of merely two initials as male. For example, if such names were treated as ambiguous, the system followed by the attorney would have provided for them to be marked as female. If this were done, the disparity would decrease to approximately 7%. Second, although Dobbs argues that he has established a 16.6% absolute disparity, neither the state habeas corpus judge nor the district court made a finding of fact that Dobbs proved a 16.6% absolute disparity, or a disparity of any magnitude, or approved Dobbs' method of calculation. We decline to accept the alleged 16.6% absolute disparity as a proven fact.

Moreover, we note that the evidence proffered by Dobbs pertained to the selection of only a single grand jury pool. Under the particular circumstances of this case, and in light of the sparse and inconclusive evidence adduced, we hold that Dobbs has failed to establish a prima facie case. When the jury commissioners have selected persons at random directly from the voter registration list, in such mechanical manner as to virtually eliminate the possibility of bias in that selection, we hold that it is not sufficient to establish a prima facie equal protection violation to establish that women are underrepresented on a single grand jury list by some undetermined amount.

With the above modifications of the previously published opinion, the Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

2. Because we reject Dobbs' claim on other grounds, we can assume arguendo that the correct standard to apply to a 1974 equal protection challenge to the exclusion of women from the grand jury is no different from the test described in the text. *But see Hoyt v. Florida*, 368 U.S. 57, 68, 82 S.Ct. 159, 166, 7 L.Ed.2d 118 (1961).

APPENDIX "C"

Wilburn DOBBS, Petitioner,

v.

Walter D. ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent.

Civ. A. No. 4:80-CV-247-HLM.

United States District Court, N.D. Georgia, Rome Division.

Aug. 7, 1989.

State prisoner under sentence of death sought federal habeas corpus relief. The United States District Court for the Northern District of Georgia, set aside death sentence subject to State's right to reinstitute sentencing procedures, and State and prisoner appealed. The Court of Appeals, 790 F.2d 1499, Anderson, Circuit Judge, reversed in part, affirmed in part and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals, 809 F.2d 750, modified opinion in part and denied petition. On remand, the District Court, Harold L. Murphy, J., held that prisoner did not shown risk of racial prejudice affecting sentencing decision to extent that death penalty was given unconstitutionally.

Petition denied.

1. **Habeas Corpus** ⇐508

In prosecution for aggravated assault, armed robbery and murder, trial court unambiguously charged jury that it could not consider evidence of defendant's prior convictions during death penalty deliberations precluding habeas petitioner's claim that jury improperly used such convictions in sentencing him to death.

2. **Habeas Corpus** ⇐712

Postdecision statement by juror about her mental process in reaching decision was inadmissible in habeas proceeding. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

3. **Criminal Law** ⇐796

In prosecution for aggravated assault, armed robbery and murder, jury instructions accurately and adequately explained contours of jury's discretion, under Georgia law, with regard to mitigating and aggravating circumstances and imposition of death penalty, despite habeas petitioner's contention that instructions were misleading because jurors were not told that they could decide not to impose death penalty even if aggravating circumstance were found to exist and that they were obligated to consider evidence in mitigation.

4. **Habeas Corpus** ⇐712

Testimony of racial bias based on juror's conduct or statements during deliberations may become admissible in habeas proceeding notwithstanding Federal Rule of Evidence to the contrary, if admissible evidence of juror's racial prejudice is so strong that death penalty appears to have been imposed on basis of defendant's race. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

5. **Habeas Corpus** ⇐723

Although evidence presented by habeas petitioner who was sentenced to death showed that venue county's history of racial segregation appeared to have had some influence on values of judge and jury in petitioner's case, petitioner failed to show that racial prejudice affected sentencing decision to extent that death penalty was given in violation of Eighth or Fourteenth Amendments. U.S.C.A. Const.Amends. 8, 14.

6. **Habeas Corpus** ⇐723

Although evidence presented by habeas petitioner who was sentenced to death showed that venue county's history of racial segregation appeared to have had some influence on values of judge and jury in petitioner's case, evidence was not so strong that death penalty appeared to have been imposed on basis of petitioner's race, as would permit inquiry into jury's deliberations.

7. **Habeas Corpus** ⇐337

Claim by habeas petitioner that jury was not qualified due to their views on capital punishment was barred under procedural default doctrine, insofar as petitioner did not move to strike jurors at trial and did not show cause for that default.

8. **Habeas Corpus** ⇐499

In prosecution for aggravated assault, armed robbery and murder, trial judge's refusal to answer jury question about possibility of parole was not constitutional error as would warrant habeas relief.

9. **Habeas Corpus** ⇐498, 712

Habeas petitioner presented no admissible evidence that jurors misconceived their sentencing alternatives, as would support his claim that form of jury's verdict was unconstitutional; verdict language accurately reflected one of the choices jury legally could make, and trial court's instructions on aggravating and mitigating circumstances were constitutionally sufficient.

10. **Habeas Corpus** ⇐508, 712

Habeas petitioner failed to establish that imposition of death penalty was improper on theory that jurors thought that death would not actually be imposed upon him; jurors' testimonies concerning their deliberations were inadmissible and petitioner's interpretation of jury's parole question to judge was speculative. Fed. Rules Evid.Rules 401, 606(b), 28 U.S.C.A.

Michael Kennedy McIntyre, Office of Michael Kennedy McIntyre and Robert Altman, Office of Robert Altman, Atlanta, Ga., for Wilburn Dobbs, petitioner.

Mary Beth Westmoreland, Office of State Atty. Gen., Atlanta, Ga., for Walter D. Zant, respondent.

ORDER

HAROLD L. MURPHY, District Judge.

Wilburn Dobbs is a Georgia inmate currently under a death sentence. He was convicted in 1974 in the Superior Court of Walker County of two counts of aggravated assault, two counts of armed robbery, and one count of murder. All the convictions arose from an incident at a convenience store in Chickamauga, Georgia in 1973.

This Court previously denied habeas corpus relief on all of Dobbs' guilt/innocence claims and some of his sentencing phase claims, but granted relief on his claim that the trial court's instruction on mitigating circumstances was inadequate. A ruling on Dobbs' remaining sentencing claims was reserved at that time. Both Dobbs and the State appealed the decision to the Eleventh Circuit, which affirmed on all grounds except the mitigating circumstances claim, which it reversed. *Dobbs v. Kemp*, 790 F.2d 1499 (11th Cir.1986), *reh'g denied with modifications*, 809 F.2d 750, *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987). The Eleventh Circuit remanded the case to this Court to consider Dobbs' remaining sentencing claims which this Court had previously reserved deciding.

The claims now before the Court are as follows: (1) the introduction at the sentencing phase of prior convictions was improper because the convictions had been obtained unconstitutionally; (2) the jury charge failed to limit the jury's discretion to impose the death penalty; (3) passion, racial prejudice, and other arbitrary factors affected the sentencing decision; (4) the jurors voted for death automatically upon finding Dobbs guilty of murder; (5) the trial judge refused to answer the jury's question regarding parole; (6) the language of the verdict form was unconstitutional; and (7) the jurors did not think that Dobbs would in fact be executed.

Before analyzing the claims, the Court notes that during discovery following the Eleventh Circuit's remand order, the Court permitted Dobbs to depose the jurors in his case. The State objected based on Federal Rule of Evidence 606(b),[1] which generally

1. Rule 606(b) reads as follows:
Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

bars post-verdict testimony of jurors. The State argued that although the jurors could testify about extraneous influences, they could not testify about the deliberations, and that the line between those types of evidence is too fine to permit testimony by depositions.

The Court decided to permit the depositions solely because one of Dobbs' claims was that race was a factor in his sentencing decision, and the recent Supreme Court opinion in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), requires that Dobbs demonstrate actual prejudice in his case. Although the Court permitted the depositions to be taken for discovery purposes, it reserved ruling on the admissibility of the evidence until it decided the merits of Dobbs' claims. For the reasons provided in this order, the jurors' statements are admissible for some purposes but not for others.

I. *Admission of Prior Convictions*

Dobbs argues that, in violation of the constitution, the State used evidence of two prior uncounseled convictions and a guilty plea in which the record does not show that Dobbs was informed of his constitutional rights. He maintains that the jurors relied on those convictions in part in deciding on the death penalty.

The State responds that Dobbs' claim has not been properly presented in this Court, and has not been exhausted in the state courts. The State argues further that the convictions were not used improperly and that, in any event, the trial jurors did not consider the convictions at the death penalty phase of Dobbs' trial.

[1] Pretermitting the State's procedural arguments, the Court finds that Dobbs is not entitled to relief on the merits of his claim. After the jury returned its guilty phase verdict, the prosecutor did tender evidence of prior convictions for forgery, escape and shoplifting. However, in its charge to the jury, the trial court unambiguously stated that the evidence of prior convictions could not be considered during the death penalty deliberations. Trial Transcript at 508. Further, as the Eleventh Circuit has found, the trial court charged the jury that the only aggravating factor argued by the State was that the murder was committed while Dobbs was engaged in the commission of another capital felony. 790 F.2d at 1513; *see also* Trial Transcript at 512.

[2] Dobbs argues, nevertheless, that one of the jurors stated in her deposition that she voted for the death penalty because of "the things he done before," and that her statement shows that the jury *did* consider Dobbs' prior convictions during the sentencing deliberations. First, because the jurors' statements were taken 15 years after the trial, their recall of their understanding of the instructions has little relevance under Federal Rule of Evidence 401. Second, the statement is inadmissible under Federal Rule of Evidence 606(b), because it is a post-decision statement of a juror about her mental process in reaching the decision. *See Fulghum v. Ford*, 850 F.2d 1529, 1535 (11th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 802, 102 L.Ed.2d 793 (1989).

The legislative history behind Rule 606(b) supports that construction. The Supreme Court transmitted a version of the rule to the House of Representatives. The House Judiciary Committee proposed a more expansive scope of admissible juror testimony. The Senate Judiciary Committee disagreed with that expansion, stating in part that the House version "would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions...." Congress eventually enacted the Senate version. *Tanner v. United States*, 483 U.S. 107, 122-25, 107 S.Ct. 2739, 2748-49, 97 L.Ed.2d 90 (1987); *see also Watson v. State of Alabama*, 841 F.2d 1074, 1076 n. 2 (11th Cir.) ("jurors are incompetent to testify as to the effect of a[n] ... instruction on the jury's deliberation or a juror's thought processes...."), *cert. denied*, — U.S. —, 109 S.Ct. 164, 102 L.Ed.2d 134 (1988). Therefore, a claim that the jury misunderstood or misapplied the law can be shown

(123)

only by proof that the jury instructions are not clear and accurate.

The Court concludes that the trial court's instruction to the jury not to consider the prior convictions shows that the convictions did not affect the sentencing decision. Habeas relief on this ground must be denied.

II. *The Charge on the Jury's Discretion*

Dobbs argues that the trial court committed constitutional error in instructing the jury on the method for determining whether to impose the death penalty. Dobbs cites portions of the charge, where the judge stated that "the law provides no standards for the guidance of the jury in the selection of the penalty," and that "the only standard, if any, that you will be permitted to consider ... is the question of whether or not you find beyond a reasonable doubt that [an aggravating circumstance exists]." Dobbs stresses that the charge was misleading because the jurors were not told clearly (1) that they could decide not to impose the death penalty even if an aggravating circumstance were found to exist and (2) that they were obligated to consider evidence in mitigation.

The State responds that the resolution of this issue is governed by the Eleventh Circuit's decision finding the trial court properly charged the jury on the nature and function of mitigating circumstances.

Under Georgia law, a jury must find that an "aggravating factor" exists before it can impose the death penalty. The purpose of aggravating factors, therefore, is to "narrow[ ] the class of persons convicted of murder who are eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 874, 103 S.Ct. 2733, 2741, 77 L.Ed.2d 235 (1983). Once an aggravating factor is found, the jury has "absolute discretion" whether to impose the death penalty by considering "all evidence in extenuation, mitigation and aggravation of punishment." *Id.* at 862, 103 S.Ct. at 2735.

[3] In its decision on the trial court's charge on the nature and function of mitigating circumstances in Dobbs' case, the Eleventh Circuit first cited instructions that, it found, accurately explained the difference between aggravating and mitigating circumstances. The Court then stated as follows:

> In addition, other instructions cautioned the jury that they were not authorized to recommend the death sentence unless they first found 'beyond a reasonable doubt ... one of the aggravating circumstances which the Legislature has provided.' *See, e.g.*, Trial Transcript at 511. The trial judge also described the particular statutory aggravating circumstance argued by the state, i.e., that the crime was committed while the defendant was engaged in the commission of another capital felony. *Id.* at 512. Moreover, the trial judge told the jury "you are not bound to sentence him to death even though you find there is an aggravating circumstance which the Legislature saw fit for a jury to consider." *Id.* at 516.

Dobbs v. Kemp, 790 F.2d at 1513. Based on this passage from the Eleventh Circuit's opinion and the Court's independent reading of the entire charge, the Court finds that the jury instructions accurately and adequately explained the contours of the jury's discretion vis-a-vis aggravating circumstances. Contrary to Dobbs' contention, the jury was informed that they could decide not to impose the death penalty even if an aggravating circumstance were found to exist. Comments by some of the jurors in their depositions, which Dobbs reads as evidencing a misunderstanding of the law, are neither relevant under Federal Rule of Evidence 401 nor admissible under Federal Rule of Evidence 606(b), for the reasons discussed above.

Dobbs claims further, though, that the instruction on mitigating circumstances was constitutionally infirm because it did not inform the jury that they were required to consider evidence in mitigation. Although the Eleventh Circuit decided that the charge properly informed the jury of the nature and function of mitigating circumstances, the decision did not expressly reach whether the jury's discretion to consider those circumstances was channeled properly.

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Dobbs cites two cases, decided after the Eleventh Circuit's decision, to support his claim. In *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), a capital case from Florida, the jury was instructed to consider statutory mitigating circumstances only in deciding whether to recommend the death penalty.[2] Further, in imposing sentence, the trial judge said that he was "mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances." The Supreme Court ruled that the consideration of mitigating circumstances could not be limited to those contained in a statute, but that nonstatutory mitigating circumstances must be considered as well. *Id.* at 397–99, 107 S.Ct. at 1823–24.

In *Penry v. Lynaugh*, — U.S. —, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the other case cited by Dobbs, the Supreme Court found that the application of the Texas death penalty statute prevented the petitioner from presenting evidence in mitigation.[3] The statute provides that the jury be instructed to answer three "special issues:" (1) whether the defendant acted deliberately or with the reasonable expectation that death would result; (2) whether the defendant would be a continuing violent threat to society; and (3) if applicable, whether the killing was an unreasonable response to any provocation by the deceased. If all three questions are answered in the affirmative, then the judge must enter a death sentence.

At his trial, Penry had presented evidence of his mental retardation and abuse as a child. The Supreme Court found that although the application of the Texas statute permitted the jury to consider that evidence in mitigation of punishment, the special issues prevented the jury from giving effect to that evidence. The Court reasoned as follows:

> "In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to *decline to impose* the death sentence." *McCleskey v. Kemp*, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "'reasoned *moral* response to the defendant's background, character, and crime.'" *Franklin [v. Lynaugh]*, 487 U.S. [164] at ——[, 108 S.Ct. 2320, 2332, 101 L.Ed.2d 155 (1987)] (opinion concurring in judgment) (quoting *California v. Brown*, 479 U.S. [538,] 545 [107 S.Ct. 837, 841, 93 L.Ed.2d 934] [1987] (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. [280,] 305 [96 S.Ct. 2978, 2991, 49 L.Ed.2d 944] [(1976)], the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

109 S.Ct. at 2951. The *Hitchcock* and *Penry* decisions, therefore, stand for the proposition that the decision makers in capital cases must be able to consider, and give effect to, unrestricted mitigating circumstances. *See id.* at 2947.

Dobbs is correct that the trial court did not explicitly state that the jury was obligated to consider mitigating circumstances. In contrast to the situations in *Hitchcock* and *Penry*, however, the jury charge did not limit the jury's consideration of circumstances that Dobbs wanted to present in mitigation and did not limit the effect of those circumstances in terms of the penalty decision. Neither Georgia law nor the charge, therefore, placed *any* restrictions on mitigating circumstances in Dobbs' case.

Moreover, at sentencing, Dobbs' attorney did not present evidence in mitigation, but did make argument in mitigation. *See Dobbs v. Kemp*, 790 F.2d at 1514 n. 15; Trial Transcript at 507.[4] As the Eleventh Circuit has commented in another case where no evidence in mitigation had been presented, "[w]e refuse to admonish the trial judge for wisely deciding not to belabor instructions on mitigation where the effect would have been to emphasize that there was no mitigating evidence on the defendant's behalf." *High v. Kemp*, 819 F.2d 988, 992 (11th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 3264, 106 L.Ed.2d 609 (1989).

In sum, the charge accurately explained the nature and function of mitigating circumstances, *Dobbs v. Kemp*, 790 F.2d at 1512–13, and the trial court did not restrict the jury's ability to consider and give effect to mitigating circumstances. Further, the charge emphasized that the jury was not bound to impose the death penalty even if an aggravating circumstance was found. *See* Trial Transcript at 516. The jury's discretion to impose the death penalty was therefore channeled properly.

III. *Passion, Prejudice, and Other Arbitrary Factors*

Dobbs claims that the jurors' decision to impose the death penalty in his case was based on racial prejudice, in that he is black and the victim was white, as well as other arbitrary factors, in violation of his constitutional rights to an impartial jury under the Sixth Amendment, to be free of cruel and unusual punishment under the Eighth Amendment, and to equal protection of the laws under the Fourteenth Amendment. The arbitrary factors other than race are the introduction of prior convictions, the jury's belief that the death penalty was automatically warranted once Dobbs was found guilty of murder, improper jury instructions, and the trial court's failure to respond to the jury's question concerning parole. Because Dobbs has raised these alleged arbitrary factors as separate claims as well, the Court will address the issue of racial prejudice in this section and will resolve the claims of other arbitrary factors under their individual headings.

The Court's analysis of the racial prejudice issue is shaped in large part by the recent Supreme Court opinion in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Similar to the situation in Dobbs' case, McCleskey, a black man whose victim was white, was sentenced to death. Proceeding under the Equal Protection Clause as well as the Eighth Amendment, McCleskey argued that the Georgia capital sentencing process was being administered in a racially discriminatory manner. As proof, he presented a statistical study showing that, in Georgia, murderers of whites receive the death penalty more often than murderers of blacks and, within the first group, black murderers of whites receive the death penalty more often than white murderers of whites.

Dobbs' claims differ from McCleskey's in that Dobbs is challenging the constitutionality of his death sentence in particular as opposed to the death penalty process in general. Nevertheless, *McCleskey* discloses two standards for the instant case. First, under the Equal Protection Clause, a habeas petitioner

> has the burden of proving "the existence of purposeful discrimination." *Whitus v. Georgia*, 385 U.S. 545, 550 [87 S.Ct. 643, 646, 17 L.Ed.2d 599] (1967). A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect on him." *Wayte v. United States*, 470 U.S. 598, 608 [105 S.Ct. 1524, 1531, 84 L.Ed.2d 547] (1985). Thus, to prevail un-

Dobbs v. Kemp, 790 F.2d at 1513–14.

2. Under the Florida capital sentencing system, unlike the Georgia system, the jury issues a recommendation as to sentence. The trial court then decides whether or not to accept that recommendation. *See Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

3. The Supreme Court had previously upheld the facial validity of the statute on an Eighth Amendment challenge in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

4. Counsel's failure to present evidence in mitigation did not constitute ineffective assistance.

der the Equal Protection Clause, [the petitioner] must prove that the decision-makers in *his* case acted with discriminatory purpose.

McCleskey, 481 U.S. at 292, 107 S.Ct. at 1766 (emphasis in original). Because of the discretion Georgia law affords the jury to impose a death sentence, "exceptionally clear proof" of purposeful discrimination is required. *Id.* at 297, 107 S.Ct. at 1769.

Second, under the Eighth Amendment, "'respect for humanity ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Id.* at 303, 107 S.Ct. at 1772, *quoting Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). The Supreme Court stated that "there is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case ... The question 'is at what point that risk becomes constitutionally unacceptable.'" *Id.* 481 U.S. at 308–09, 107 S.Ct. 1775, *quoting Turner v. Murray*, 476 U.S. 28, 36 n. 8, 106 S.Ct. 1683, 1688 n. 8, 90 L.Ed.2d 27 (1986).

Measured against these standards, the Supreme Court affirmed the denial of habeas corpus relief in *McCleskey*. Under the Equal Protection Clause, the Court ruled, the statistics did not support an inference that the jurors in McCleskey's particular case acted with discriminatory purpose in deciding to impose death. Further, under the Eighth Amendment, the Court held that the safeguards built into Georgia's capital sentencing procedures (*e.g.*, *voir dire* proceedings, change of venue motion), together with the fundamental value of the jury system, minimize the effects of racial bias such that statistics are insufficient "to demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."

Under Dobbs' Equal Protection claim, therefore, Dobbs must show that the jurors acted with discriminatory purpose when they decided to impose the death penalty. *See McCleskey*, 481 U.S. at 292, 107 S.Ct. at 1766, *citing Wayte*, 470 U.S. at 608, 105 S.Ct. at 1531;[5] *Bundy v. Dugger*, 850 F.2d 1402, 1414 (11th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 849, 102 L.Ed.2d 980 (1989). Under Dobbs' Eighth Amendment claim, the standard is less stringent: Dobbs must show that the jurors possessed racial biases that created an "unacceptable risk" that race affected the sentencing decision.[6]

The application of these standards presents a difficult evidentiary issue concerning the admissibility of juror testimony. Under Federal Rule of Evidence 606(b), as stated, "post-decision statements by a judge or juror about his mental processes in reaching [a] decision may not be used as evidence in a subsequent challenge to the decision." *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (11th Cir.1982), *cert. denied*, 464 U.S. 1002, 1003, 104 S.Ct. 508, 509, 78 L.Ed.2d 697 (1933). However, a juror *can* testify concerning "any mental bias in matters unrelated to the specific issues that the juror was called upon to decide and whether extraneous prejudicial information was improperly brought to the juror's attention." *Rushen v. Spain*, 464 U.S. 114, 121 n. 5, 104 S.Ct. 453, 457 n. 5, 78 L.Ed.2d 267 (1983); *see Fulghum v. Ford*, 850 F.2d 1529, 1535 (11th Cir.1988), *cert. denied*, — U.S. —, 109 S.Ct. 802, 102 L.Ed.2d 793 (1989).

Racial prejudice is a "mental bias ... unrelated to the specific issues that the juror was called upon to decide." A habeas petitioner in a capital case, therefore, may take testimony from a trial juror to show that the juror possesses racial biases that, under the Eighth Amendment standard, created an "unacceptable risk" that race affected the death penalty decision.[7] However, under the Equal Protection claim, Dobbs must go further and show that the sentencing decision was actually motivated by racial prejudice. A conflict emerges between these two rules: whereas the *McCleskey* standard requires a petitioner to show actual bias in the sentencing decision, Rule 606(b) precludes inquiry into the decision making process.

In resolving that conflict, the Court initially notes that "Rule 606(b) strikes a balance between the defendants' right to a fair trial free from substantial juror misconduct, while protecting harassment of jurors, supporting the finality of verdicts, and preserving the community's trust in a system that relies on the decisions of lay people." *United States v. Sjeklocha*, 843 F.2d 485, 488 (11th Cir.1988). The Court is aided further in its analysis by the Supreme Court's decision in *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), where a juror stated, post-verdict, that several of the jurors consumed alcohol, smoked marijuana and ingested cocaine during the trial.[8] The Supreme Court first decided that the evidence was inadmissible under Rule 606(b) because juror intoxication is not an outside influence on the deliberations. The Court then determined that the defendant's Sixth Amendment right to a fair trial before an impartial and competent jury was not violated by the application of Rule 606(b) because the defendant's interest is "protected by several aspects of the trial process." The Court reasoned as follows:

> The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel.... Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict.... Finally, after the trial a party may seek to im-

5. In *Wayte*, the defendant argued that the government selected him for prosecution for failing to register for the draft because he was a vocal opponent to the draft, and that the government's selection of him for exercising his constitutional rights was discriminatory. The Supreme Court rejected his claim because the evidence did not show "that the Government prosecuted him *because of* his protest activities." 470 U.S. at 610, 105 S.Ct. at 1532 (emphasis in original).

By citing *Wayte* in its *McCleskey* opinion, the Supreme Court conveyed that a habeas petitioner in a capital case who alleges that the sentencing decision was racially discriminatory in violation of the Equal Protection Clause must show that the jurors sentenced him to die because of his race.

6. For all practical purposes, the distinction between the Equal Protection claim and Eighth Amendment claim is not significant in a capital case: if the evidence shows an "unacceptable risk" that race affected the sentencing decision under the Eighth Amendment standard, then the petitioner would be entitled to relief whether or not he went further and proved that race was actually a motivator in the decision, in violation of the Equal Protection Clause. The "unacceptable risk" standard, however, applies to capital cases only. *See Turner v. Murray*, 476 U.S. at 33, 35 n. 7, 36 n. 8, 106 S.Ct. at 1686, 1688 n. 7, 1688 n. 8 (distinguishing *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), as a noncapital case). A petitioner in a noncapital case could not rely on the Eighth Amendment standard, but would have to show that race was actually a factor in his sentencing. The distinction between the two types of claims must therefore be drawn.

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7. Arguably, a habeas petitioner should not be allowed to bypass the *voir dire* process and investigate the racial prejudices of the jurors after the verdict has been received. However, the State has not made that argument, and evidence of mental bias is admissible under Rule 606(b), pursuant to the language from *Rushen* that is quoted in the text. In any event, evidence that the sentencing decision was based on race, which the Supreme Court has said is required to show an Equal Protection violation, could not be obtained until the verdict has been rendered. Post-verdict evidence is essential in that context because although the *voir dire* process could reach evidence of an Eighth Amendment violation, it would not yield evidence needed to show an Equal Protection violation.

8. The evidence in *Tanner* was summarized by the Supreme Court as follows:

> [Juror] Hardy stated that he "felt like ... the jury was on one big party." Hardy indicated that seven of the jurors drank alcohol during the noon recess. Four jurors, including Hardy, consumed between them "a pitcher to three pitchers" of beer during various recesses. Of the three other jurors who were alleged to have consumed alcohol, Hardy stated that on several occasions he observed two jurors having one or two mixed drinks during the lunch recess, and another juror, who was also the foreperson, having a liter of wine on each of the three occasions. Juror Hardy also stated that he and three other jurors smoked marijuana quite regularly during the trial. Moreover, Hardy stated that during the trial he observed one juror ingest cocaine five times and another juror ingest cocaine two or three times. One juror sold a quarter pound of marijuana to another juror during the trial, and took marijuana, cocaine, and drug paraphernalia into the courthouse. Hardy noted that some of the jurors were falling asleep during the trial, and that one of the jurors described himself to Hardy as "flying."

483 U.S. at 115–16, 107 S.Ct. at 2745.

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peach the verdict by nonjuror evidence of misconduct....

In light of these other sources of protection of petitioners' right to a competent jury, we conclude that the District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional post-verdict evidentiary hearing was unnecessary.

483 U.S. at 127, 107 S.Ct. at 2751 (emphasis in original) (citations omitted).

Dobbs' case is distinguishable from *Tanner* in that racial bias is not as observable as intoxication. Nevertheless, the law does permit evidence of racial bias to be admitted in several ways: during *voir dire*, by juror testimony about another juror's statements or conduct *prior* to the verdict, and by post-verdict evidence of a juror's bias. Given these methods of showing that race influenced the sentencing decision, Rule 606(b)'s prohibition ordinarily would not impair a defendant's ability to show an Equal Protection or Eighth Amendment violation.

[4] In a given case, however, testimony of racial bias based on a juror's conduct or statements during the deliberations may become admissible notwithstanding Rule 606(b) if the admissible evidence of a juror's racial prejudice is so strong that the death penalty appears to have been imposed on the basis of the defendant's race. In the face of strong evidence that the defendant's constitutional rights, under the standards articulated in *McCleskey*, may have been violated, the statutory Rule 606(b) privilege would have to yield. In such a case, the balance between the defendant's rights and the society's interest in protecting the jury system would not be met by enforcing Rule 606(b).

Having resolved that conflict, the Court turns to the evidence that Dobbs presents of racial prejudice. The case law makes clear, however, that only certain types of prejudice entitle a habeas petitioner to relief from his sentence. In *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), the Supreme Court decided that a defendant in a capital case where the defendant is black and the victim was white has a constitutional right to question the jury venire on their racial prejudices. The Supreme Court explained as follows:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence-prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

The *Turner* Court concluded that the petitioner had shown a constitutional violation because the trial judge's refusal to permit *voir dire* on racial attitudes created an unacceptable risk that "racial prejudice may have infected petitioner's capital sentencing."

In the instant case, therefore, Dobbs must establish that the jurors were influenced by racial prejudices, akin to the types described in *Turner*, that would make them more likely to impose the death penalty when the defendant is black than when the defendant is white. If the evidence of their biases in that regard is particularly strong, then the Court will examine the juror's testimonies concerning their mental processes during the deliberations.

Dobbs relies on several factors to show that racial prejudice tainted the sentencing decision. He first argues that the procedural safeguards outlined in *McCleskey* for eliminating the effects of racial biases from criminal trials in Georgia did not function in Dobbs' case. Specifically, Dobbs asserts that his attorney did not effectively conduct *voir dire* to discover racial prejudice and prevent it from infecting the proceedings.

The *voir dire* in Dobbs' case was by no means comprehensive. However, the fact

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that Dobbs' attorney did not conduct an exhaustive *voir dire* examination does not mean that racial prejudice affected Dobbs' sentencing decision. The *McCleskey* Court discussed the *existence* of procedural safeguards to refute McCleskey's argument that his statistics, standing alone, showed an unacceptable risk that race was a factor at his particular sentencing. The Court did not find it necessary to determine whether those safeguards *actually functioned* in McCleskey's case.

In any event, the attorney's failure to conduct an exhaustive *voir dire* examination on racial views is cured by the lengthy deposition questioning on that topic that has been undertaken in connection with the instant habeas corpus proceeding. The perfunctory *voir dire* process has not impeded Dobbs' ability to examine the jurors' views.

The other evidence Dobbs relies on include statements made during the trial, the depositions of the jurors, the judge, and the defense attorney, and the racial climate of Walker County at the time of the trial.[9] That evidence shows that Dobbs was tried in Walker County, a primarily rural area of Northwest Georgia where approximately 4% of the population is black. For many years, the public institutions and business establishments were segregated racially. Desegregation efforts were not undertaken until they were compelled by the federal government in the 1960's.

The statements of the trial jurors reflect the segregated history of Walker County. Ten of the eleven deposed jurors[10] are white, and most were raised in segregated schools and social environments. Only a few of the jurors had social contacts with blacks when they were growing up,[11] and many of their contacts with blacks as adults are through work only.[12] The jurors' children did attend integrated schools, and some of them did have black playmates. Many jurors attend segregated churches, but also believe that blacks should be allowed to become members.[13] All the jurors expressed reservations about interracial dating and marriage, ranging from complete disapproval to respect for another person's choices.[14]

Most of the jurors understand the goals of Martin Luther King, Jr. insofar as they

9. The State has raised numerous objections to the admissibility of much of the deposition testimonies. The State's objections in general have been resolved in the Court's prior discussion of the admissibility of juror testimony. Rather than responding explicitly to each of the State's objections to the specific questions, the Court has based its decision solely on admissible evidence.

10. The twelfth trial juror is deceased.

11. *See* Petitioner's Exhibit 4 at 11; Petitioner's Exhibit 8 at 9, 12; Petitioner's Exhibit 10 at 15; Petitioner's Exhibit 12 at 7 (white jurors who had black playmates when they were children).

12. *But see* Petitioner's Exhibit 3 at 7–8; Petitioner's Exhibit 4 at 29–30, 32; Petitioner's Exhibit 8 at 21; Petitioner's Exhibit 12 at 11–12 (white jurors who have black friends).

13. *See* Petitioner's Exhibit 2 at 27, 46; Petitioner's Exhibit 3 at 26–27; Petitioner's Exhibit 6 at 45; Petitioner's Exhibit 10 at 25–26 (white jurors who believe blacks should be allowed in their churches);
but see Petitioner's Exhibit 7 at 16 (white juror who would feel uncomfortable in an all black church and who believes blacks would not be comfortable in an all white church).

14. *Compare*
Petitioner's Exhibit 3 at 22 ("I believe in blacks marrying blacks and whites marrying whites.... It's because of the children that come forth of those marriages. I do not believe that they really have a place with whites or blacks. But I mean, if she was a sweet little ol' girl I probably would love her just like a white one");
Petitioner's Exhibit 4 at 46–47 ("I hope that it wouldn't bother me a lot");
Petitioner's Exhibit 8 at 18–19 (interracial dating by her children would give her pause but she would not try to talk them out of a long term relationship);
Petitioner's Exhibit 10 at 37 (her thoughts about interracial dating "would be according to the person.... It would have been who it was, not the color of the skin");
with
Petitioner's Exhibit 6 at 24–25 ("I just don't believe in mixing people. Now, you can have them as friends. But I don't—I think that that child somewhere down the line is going to suffer because of it. And it's not just because of the black child, it's the black people having the white child. I just don't—I just don't agree with that");
Petitioner's Exhibit 7 at 18 (would not have allowed her daughters to date a black man).

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perceived him as trying to obtain equal rights for blacks. Although several jurors were bothered by his methods and found him intrusive,[16] some were outspoken in their support for King's goals.[16] None of the jurors said that they agreed with the principles espoused by the Ku Klux Klan, although several said that they had no knowledge of the Klan, its ideas, or its activities.[17]

Several of the jurors referred to blacks as "colored," and none of them said whether it had negative connotations. Most indicated the word "nigger" was insulting and disrespectful,[18] although two jurors admitted using the word on occasion. One of those jurors said he uses the word when he intends to be negative,[19] and the other juror said she uses the word when she is with blacks who use the word themselves, and that the word is not negative anymore.[20]

When asked directly, none of the jurors stated that they viewed blacks as more violence prone than whites, or as morally inferior to whites.[21] Two of the jurors did express a fear of blacks.[22] To varying degrees, all the jurors said that their opinion of a black person depends on the qualities of the individual and/or that skin color does not determine those qualities.[23]

15. *See* Petitioner's Exhibit 3 at 19–20 ("I didn't particularly care for Martin Luther King. But the things he stood for in terms of helping the coloreds to come out and to make themselves known, I think that's right");
Petitioner's Exhibit 7 at 19–20 (Martin Luther King was "pushy and it seemed like everywhere he went there was a riot or something bad to happen. He was a preacher and should have stayed in the church. He was out of his place");
Petitioner's Exhibit 12 at 25–27 (Martin Luther King did things he believed in but was forward and disruptive).

16. *See* Petitioner's Exhibit 6 at 37–38 (Martin Luther King has "done the black people a lot of good as far as being leaders and being able to—maybe gave them confidence in themselves to try for these better things");
Petitioner's Exhibit 8 at 14, (Martin Luther King "was doing a good job. And I think what he was doing was right.... [H]e was making it a better place for his people as well as for other people.... [His tactics were needed] to get their attention"); *id.* at 41.

17. Dobbs cites the depositions of two of the jurors as expressing support for the Klan's activities. One of those jurors said that she heard that the Klan does "some good sometimes at Christmas time and all," but also added that "then I hear terrible things." She said further that "I have heard that they hate—I don't know if it's just black groups of people—unjust groups of people [too]." She said that she would not go to a Klan barbecue because she doesn't know what their beliefs are. Petitioner's Exhibit 2 at 40–41.
In the other deposition cited by Dobbs, the juror said that she knew nothing about the Klan and that she has heard people say they do some good things, but that she has not heard specifically what those good things are. Petitioner's Exhibit 8 at 21.
The Court concludes that neither of these jurors expressed agreement with the Klan's outspoken hatred of blacks, as well as other classifications of people.

18. *See, e.g.*, Petitioner's Exhibit 8 at 19; Petitioner's Exhibit 10 at 27; Petitioner's Exhibit 11 at 22.

19. Petitioner's Exhibit 4 at 43–44.

20. Petitioner's Exhibit 12 at 20.

21. Dobbs cites the depositions of two of the jurors as showing a belief that blacks are inferior morally to whites. One of those jurors stated that in her estimation, the morals of Dobbs' family *in particular* were low, *not* those of blacks as a race. Petitioner's Exhibit 9 at 61. The other juror stated that she would not have allowed a black man to date her daughter. Petitioner's Exhibit 7 at 18. Although that statement evinces a view of blacks as different from whites, it does not necessarily mean that she views blacks as morally inferior.

22. Dobbs cites the depositions of three of the jurors as expressing fear of blacks. One of those jurors said that she would fear a black on the street, but added that she would not want to be "out there in the dark" with some whites either. Petitioner's Exhibit 7 at 16. Another juror said that a lot of people she knew are more afraid of blacks than whites and that she "guessed" she felt a little bit the same way. Petitioner's Exhibit 11 at 32–33.
The third juror cited by Dobbs did not express the same sentiments. She stated that Dobbs *in particular* looked "eerie" during the trial, not that blacks in general are scary. Petitioner's Exhibit 3 at 31. The Court therefore concludes that only two of the jurors said that blacks are scarier than whites.

23. *See* Petitioner's Exhibit 2 at 31 (blacks are not lazier by nature than whites); *id.* at 37 (blacks deserve to be given a job over whites if they are qualified);
Petitioner's Exhibit 3 at 18–19 ("There's good whites and there's bad whites. There's good blacks and there's bad blacks"); *id.* at 23 ("color would be the only difference [between blacks and whites]. I mean, they're all human beings. They're no different than Mexicans. Of course, some people don't like Mexicans or the Jews, I don't have anything against Jews. We're all created by God, we're created in his image. We are somebody, we are a living soul");
Petitioner's Exhibit 4 at 32 ("there's good white folks and there's good black folks"); *id.* at 41 ("there's blacks that have got a lot more than I've got that's born in this world and they are not underdogs. And there's blacks that have got a lot less than I've got that are born in this world and I guess they're underdogs. There's whites that have got a lot less than I've got that are underdogs. The whites that have more than I have, they've got an advantage. I don't see where you can say black and white, black and white, it's people");
Petitioner's Exhibit 5–2, the deposition of the only black juror, at 22 ("I just have never been on a black or white issue, I think of people as being people.");
Petitioner's Exhibit 6 at 24 ("I don't think that it's just the black communities that has the problems.... Where they're thickly settled, I guess. There's always problems going on where there's a lot of people"); *id.* at 26 ("morals don't have anything to do with black or white.");
Petitioner's Exhibit 7 at 17 (the main difference between black people and white people is "their color ... that's all.");
Petitioner's Exhibit 8 at 26–27, 31–32 (doesn't know what the main difference between black people and white people is, but doesn't believe blacks are lazier or more prone to violence);
Petitioner's Exhibit 9 at 44 ("some black people are inferior and some white people are inferior. We all have some of that complex"); *id.* at 48 (some blacks "are more intelligent [than whites] and some of them they have more knowledge of their job, their position. And some of them—I've been in some [business] meetings where I had black leaders that I felt because they were black they were in that position and they were really not qualified. And I have been in meetings with whites that were not qualified for their jobs. So it works both ways.");
Petitioner's Exhibit 10 at 20–22 (how people decide to lead their lives, including being ambitious, "comes back to the individual.");
Petitioner's Exhibit 11 at 21 ("I respect [blacks] for the simple reason that they can't help the color of their skin more than I can help the color of my skin.");
Petitioner's Exhibit 12 at 19 ("there are good blacks and there are good whites. There are bad blacks and there's bad whites." The less fortunate people, whether they are black or white, need help through government programs).

24. Petitioner's Exhibit 16.

The trial judge, who was also deposed, grew up in Walker County during the segregation era. His contacts with blacks as a child were limited to housekeepers. The judge worked with blacks after he graduated from college and had a close black friend in the military. As a state legislator from 1951 to 1962, the judge voted consistently for bills that renounced the Supreme Court's integration decisions.[24] As a state court judge, he presided over cases where both blacks and whites were given the death penalty for killing whites.

The trial judge referred to blacks as "colored" during his deposition, and called Dobbs "colored" at the trial. In his deposition, he stated that his mother had taught him to use the word "colored" because "black" did not sound good, and that he has never used the word "nigger." At one point, he said "let's call them blacks."

Dobbs' trial attorney was outspoken about his views. He said that many blacks are uneducated and would not make good teachers, but do make good basketball players. He opined that blacks are less educated and less intelligent than whites either because of their nature or because "my granddaddy had slaves." He said that integration has led to deteriorating neighborhoods and schools, and referred to the black community in Chattanooga as "black boy jungle." He strongly implied that blacks have inferior morals by relating a story about sex in a classroom. He also said that when he was young, a maid was hired with the understanding that she would steal some items. He said that blacks in Chattanooga are more troublesome than blacks in Walker County. He did say, however, that Martin Luther King, Jr. was "a great man."

The attorney stated that he uses the word "nigger" jokingly. He testified further that, in his experience as a criminal defense lawyer, a black accused of killing a white is more likely to be convicted than a black charged with killing a black, although he did not know why. He also said that he found Dobbs to be arrogant and uncooperative during the trial, and he believes that Dobbs would have been given

the death penalty regardless of his degree of cooperation.

The trial transcript reveals that the judge and defense lawyer referred to Dobbs as "colored" and "colored boy" and that the prosecutor called Dobbs by his first name at one point.

Alex Willingham, a political scientist, testified that he investigated the history of racial attitudes in Walker County, including those that existed when Dobbs was tried, by reading local newspaper articles, interviewing black residents of the county, and examining voting patterns.[25] Based on his research, Willingham concluded that race relations were on the minds of the people in the area during the time of the trial, as reflected in the struggle over ending segregation. Willingham also reviewed the depositions, and believed race was a factor at Dobbs' trial. He highlighted various portions of the depositions, such as the use of the word "colored" and the defense attorney's views of blacks. He said that the word "colored" reveals a view of blacks as different from, and ultimately inferior to, whites. He opined that because value systems are so ingrained, the jurors could not "effectively conceive of Dobbs as an individual free of their racial stereotypes."

Based on the evidence presented, the Court finds that Walker County's history of racial segregation appears to have had some influence on the values of the players in Dobbs' case. The jurors, the trial judge and the defense attorney were raised in segregated environments and continue to interact primarily with individuals of their own race. The attorney expressed beliefs, often in pointed ways, that blacks in general are inferior to whites morally and intellectually. As the Supreme Court stated in *Turner v. Murray*, one with his beliefs might be inclined to favor the death penalty when the defendant is black. Further, the references at trial to Dobbs as "colored" may have had an influence on the jury's view of Dobbs as an individual. Although "colored" may have been an acceptable term when the judge and attorney were growing up, their continued use, especially in a courtroom setting, evinces a degree of insensitivity to black concerns.

The personal views of the defense attorney, however, were not expressed at trial, and the attorney himself did not decide Dobbs' penalty. The personal views of the judge and prosecutor, which have not been shown to be racist, similarly were not related to the jurors. The evidence therefore does not show that these individual's racial attitudes, apart from the trial references discussed above, affected the sentencing deliberations.

Without a doubt, many of the jurors believe that the races should mix to a limited extent only. In a subtle way, a belief that blacks are inferior to whites may underlie segregated beliefs insofar as blacks may be seen as a threat to the stability of the white society. Also, many of the jurors used the word "colored," which as discussed shows insensitivity to racial matters. On the other hand, though, the jurors said that their opinion of a black person is based on his characteristics as an individual and not on his race.

The testimony of Willingham regarding the history of race relations in Walker County and the significance of race in the minds of the county's residents at the time of the trial is interesting from a social science perspective. Under the Supreme Court's reasoning in *McCleskey*, however, the likelihood of race being a factor in a particular case is insufficient standing alone to show that race was actually a factor in a particular case. Given the requirement for specific evidence of the biases of the decision makers in Dobbs' case, Willingham's testimony of race relations in general is of little relevance to the resolution of the issues presented for decision. His interpretations of the depositions, on the other hand, are helpful to the Court in

25. The State objects to Willingham's testimony on several grounds, including his competency as an expert, the method of his research, and that the sources of the research are hearsay and are not in the record. The objections to the methods and sources of the research are well taken. Additionally, as discussed *infra*, given the Supreme Court's admonition in *McCleskey* that evidence of racial bias must be specific to the petitioner's case, evidence of racial climate in a community is of little moment.

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making its independent judgment about the mental biases of the decision makers.

[5] After considering all the evidence, the Court concludes that Dobbs has not shown a risk of racial prejudice affecting the sentencing decision to the extent that the death penalty was given unconstitutionally. Although the jurors possess some racial prejudices, and some more so than others, Dobbs has not shown that the jurors, either individually or as a whole,[26] were influenced by prejudices that would make them favor the death penalty for a black person who murdered a white person.

[6] Based on these findings, the Court concludes that Dobbs has not shown an Eighth Amendment violation, that an unacceptable risk existed that racial considerations affected the jurors' decision to impose the death penalty. Further, the evidence does not reach the level, described above, that would permit inquiry into the jury's deliberations. The Court therefore concludes additionally that Dobbs has not shown that the issuance of his death verdict violated the Equal Protection Clause.

IV. *Jurors Voted Automatically for Death*

Dobbs argues that the jurors' testimonies indicate that they misconceived the role of aggravating circumstances and voted automatically for the death penalty based on the murder alone. He argues further that some of their statements about voting automatically for death shows that they were not qualified to hear a capital case.

The State responds that the issue was not raised in the state courts or this Court, and also that Dobbs is not entitled to relief on the merits.

The Court has previously determined that the jury instructions on the role of aggravating circumstances were clear and that Federal Rules of Evidence 401 and 606(b) preclude inquiry into the jury's understanding of those instructions. Dobbs' claim that the jury disregarded those instructions and voted for death automatically in his case is therefore rejected.

Dobbs' claim that the jurors were not qualified due to their views on capital punishment is also without merit. In *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), the Supreme Court reiterated that "the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment ... is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'" *Id.*, 108 S.Ct. at 2276, *quoting Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), *quoting Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980).

[7] First, Dobbs' claim is barred under the procedural default doctrine because Dobbs did not move to strike the jurors at trial and has not shown cause for that default. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The jurors' attitudes about capital punishment were certainly discoverable at that time. Second, Dobbs has not shown that the jurors were not qualified. In their depositions, the jurors, for the most part, gave their views on the propriety of the death penalty in Dobbs' *particular* case.[27] Moreover, there is no proof that they would have been unable to follow the judge's instructions concerning aggravating and mitigating circumstances.

26. When a habeas petitioner challenges the prejudice of the jury, the standard is prejudice regarding the trial jury as a *whole*. *See Patton v. Yount*, 467 U.S. 1025, 1032, 104 S.Ct. 2885, 2889, 81 L.Ed.2d 847 (1984); *Bundy v. Dugger*, 850 F.2d at 1426; *Jordan v. Lippman*, 763 F.2d 1265, 1277 (11th Cir.1985). On the other hand, when a petitioner claims that an individual juror was impartial, the question "is plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. at 1036, 104 S.Ct. at 2891.

27. *See, e.g.*, Petitioner's Exhibit 2 at 34; Petitioner's Exhibit 3 at 31–32; Petitioner's Exhibit 4 at 58–59; Petitioner's Exhibit 6 at 32; Petitioner's Exhibit 7 at 27; Petitioner's Exhibit 10 at 36.

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V. *The Trial Court's Refusal to Answer the Jury's Question About Parole*

During the penalty phase deliberations, the trial judge was informed that the jurors had a question. The judge called the jury in, whereupon the following colloquy occurred:

> THE FOREMAN: We the jury would like to know on the—say a felony from 1 to 10 years, we would sentence them to 10 years, would he be eligible for parole within that 10 years?
>
> THE COURT: Now that is a question that the Court cannot comment on. I think that if I commented on anything like that, I know it would be reversible error. I just cannot answer it because the law won't let me do so. I'm sorry.

Trial Transcript at 519.

Dobbs states that under Georgia law today, the trial court would be required to inform the jury that parole cannot be considered, and argues that a judge should be required to do so by federal law as well.[28] The State responds that a jury may consider the possibility for parole but that, in any event, there is no evidence that the jurors in Dobbs' case considered parole.

[8] The State's position, that the jurors did not consider parole, strains credulity given their straightforward question in the midst of their deliberations. However, despite Dobbs' strong reasons for requiring a jury to be told not to consider the possibility of parole, his argument for a constitutional rule is foreclosed by circuit precedent. In *Tucker v. Zant*, 724 F.2d 882 (11th Cir.1984), *vacated on other grounds*, 474 U.S. 1001, 106 S.Ct. 517, 88 L.Ed.2d 452 (1985), a capital case, the Eleventh Circuit was presented with facts strikingly similar to those at bar. The *Tucker* Court reasoned as follows:

> Tucker points out that, when the jury foreperson asked about the possibility of parole from a life sentence, the trial court simply refused to answer the question. Tucker argues that the court, once it knew that the jury was considering the possibility of parole, was constitutionally required to instruct the jurors to disregard parole in its deliberations. The trial court's refusal to discuss parole was based on Georgia law, which prohibits the jury in any criminal case from being informed of the possibility of parole. O.C.G.A. § 17–8–76(a). In *California v. Ramos*, [463] U.S. [992], 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the Supreme Court held that the Constitution does not prohibit notifying the capital sentencing jury of the power of the governor to commute a [death] sentence [to] life without parole. *We must conclude, therefore, that defendants in the sentencing phase of a capital murder trial have no federal right to prevent jury consideration of the possibility that they will be paroled if sentenced to life imprisonment. Consequently, the trial court's failure to instruct Tucker's jury to disregard that possibility could not have violated the Constitution.*

Id. at 892 (emphasis added); *see also Kordenbrock v. Scroggy*, 680 F.Supp. 867, 893 (E.D.Ky.1988).

On the authority of *Tucker*, the trial judge's refusal to answer the Dobbs jury's question regarding parole was not constitutional error.

VI. *Unconstitutional Form of the Verdict*

Dobbs argues that the form of the jury's verdict was unconstitutional. The language of the verdict reads as follows:

> On Count Five we the jury fix the punishment of the defendant to be punished death [sic] by electrocution since the offense of murder was committed while the Defendant was engaged in the commission of another capital felony.

Trial Transcript at 520. Dobbs contends that the verdict is unconstitutional because it reflects the jury's misconceptions (1) that the death penalty was automatic once an aggravating circumstance was found, and (2) that they did not even need to find an aggravating circumstance apart from the murder. The State responds that the jury charge, taken as a whole, demonstrates that the meaning of the jury's verdict was clear.

[9] The Court rejects Dobbs' arguments because the verdict language accurately reflects one of the choices the jury legally could decide. Given that the trial court's instructions on aggravating and mitigating circumstances were constitutionally sufficient, as discussed above, there is no admissible evidence that the jurors misconceived their alternatives.

VII. *Jurors Thought Death Would Not Actually Be Imposed*

[10] Dobbs contends that the jurors did not think that Dobbs would in fact be executed. He points out that the trial occurred after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), struck down the death penalty statute and before *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), once again permitted executions. Dobbs notes further that some of the jurors' testimonies reflect that misconception, and that the trial judge's failure to answer their question on parole "only added to the juror's anxiety regarding the release of Mr. Dobbs."

The Court rejects Dobbs' argument because the jurors' testimonies concerning their deliberations are inadmissible under Federal Rules of Evidence 401 and 606(b), as discussed, and Dobbs' interpretation of the jury's question is speculative.

ACCORDINGLY, Dobbs' petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED, this the 7th day of August, 1989.

28. Dobbs' assertion of Georgia law appears correct. In *Quick v. State*, 256 Ga. 780, 787, 353 S.E.2d 497 (1987), the Georgia Supreme Court ruled that "[i]f, and only if, the jury asks to be instructed about the possibility of parole, the court should mention the issue only to the extent of telling the jury in no uncertain terms that such matters are not proper for the jury's consideration." The Court "suggested" that the following language be used: "You shall not consider the question of parole. Your deliberations must be limited to whether this defendant shall be sentenced to death or whether he shall be sentenced to life in prison. You should assume that your sentence, whichever it may be, will be carried out." *Id.* at 787 n. 3, 353 S.E.2d 497.

APPENDIX "D"

FILED IN CLERK'S OFFICE
U.S.D.C. - Rome

MAR 6 1990

LUTHER D. THOMAS, Clerk
By: V. Vandingham
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

WILBURN DOBBS,

Petitioner,

v.

CIVIL ACTION
4:80-cv-247-HLM

WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent.

ORDER

Dobbs was convicted of murder and sentenced to death in 1974. When he took a direct appeal to the Georgia Supreme Court, he requested that the clerk of the court include the entire trial record. It is undisputed that the closing arguments in the sentencing phase of the trial were not forwarded to the Georgia Supreme Court.

After exhausting his state collateral proceedings, Dobbs filed a petition for habeas corpus in this Court. Dobbs moved the State to produce the prosecutor's comments at sentencing. The State represented that those comments had not been transcribed, and submitted affidavits to that effect from the trial judge, counsel and the court reporter.

This Court denied relief on Dobbs' guilt/innocence phase claims but granted relief from the death verdict based on the jury charge on mitigating circumstances. The Eleventh Circuit affirmed this Court's ruling on the guilt/innocence phase claims but reversed on the mitigating circumstance claim, and

remanded to this Court to resolve the remaining sentencing phase claims.

In August, 1989, after permitting extensive discovery, the Court analyzed the remaining claims and found no constitutional error. Dobbs promptly moved the Court to reconsider its decision.

While the reconsideration motion was pending, Dobbs' attorneys obtained permission from the Court to search the state court reporter's warehouse, and were able to locate stenographic notes of the closing arguments during the sentencing phase of Dobbs' trial. The attorneys arranged for Rufus Hixon, Judge Shoob's court reporter, to transcribe those notes. Hixon also corrected portions of the existing transcript based on those notes, and has submitted an affidavit concerning his corrections.

I. Motions to Expand the Record, to Amend the Petition, and to Reopen Prior Rulings in Light of New Evidence

Dobbs now moves the Court to expand the record to include the new evidence he has located, moves the Court to amend his petition to add a new claim regarding the prosecutor's comments during the sentencing phase, and moves the Court to reopen and reconsider its ruling on claims previously asserted in light of the new evidence.

The State objects to the expansion of the record because Dobbs delayed in locating the transcript. Additionally, the State objects to the proposed amendment on the ground of exhaustion.

Dobbs responds that the delay was due to the State's affirmative misrepresentation that a transcript was unavailable and Dobbs should therefore be allowed to litigate his claims at this point.

The only substantive issues that are properly before the Court at this time are the ones that Dobbs wants reconsidered. The issues that Dobbs wants reopened (ineffective assistance of trial and appellate counsel and the constitutionality of the death penalty as applied to him)[1] were decided prior to the Eleventh Circuit's remand. The remand order limited this Court's consideration to issues upon which this Court had reserved judgment. If Dobbs wants to present additional evidence on other issues, he must do so in a separate proceeding.

Additionally, the proposed amendment challenging the constitutionality of the prosecutor's closing argument cannot be considered by this Court, for to do so would create a

---

[1] Due to an apparent oversight on Dobbs' behalf in drafting his procedural motions, his claim that the jury did not believe he would be executed is before the Court on the merits as it was decided after the remand.

"mixed petition." See Rose v. Lundy, 455 U.S. 209 (1982).

The issues that Dobbs wants reconsidered, however, are properly before the Court, and the Court must weigh whether the new evidence should be considered. On one hand, Dobbs delayed until the "eleventh hour" to search for the notes of the arguments, as he waited until this Court had issued a final order disposing of all his claims before he began his search, and the notes were then found without too much difficulty.

On the other hand, the entire transcript should have been made available for Dobbs' direct appeal, and the State represented to this Court that the sentencing phase closing arguments could not be transcribed. Dobbs' position that he legitimately relied on the State's representation is well taken.

In weighing the interests of comity and federalism, the Court finds that, to the extent that the claims Dobbs wants reconsidered are based on the closing arguments at the sentencing phase, they should be heard initially in state court. The Court's decision is based in large part on the fact that Dobbs has called into question the process by which his trial was transcribed, which is a matter of state law. See O.C.G.A. § 17-10-35. Once the state court has considered the State's failure to disclose the transcript along with Dobbs' failure to locate the evidence sooner, the federal courts will

be in a better position to evaluate the constitutional implications of these claims, should another petition be in order.[2]

---

[2] The Court notified Dobbs orally of its decision on his procedural motions before this written order was entered. In a letter to the Court following the verbal notice, Dobbs maintained that, on the authority of Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983), reh'g denied, 739 F.2d 529 (11th Cir. 1984), cert. denied, 469 U.S. 1127 (1985), this Court should hold his case in abeyance pending the state court's resolution of the issues. In Arango, while the appeal was pending, the Eleventh Circuit discovered that Arango was pursuing relief on additional claims in state court and that the Florida Supreme Court had remanded an issue to the trial court for an evidentiary hearing. The Eleventh Circuit ordered that the federal proceeding be stayed, reasoning as follows:

> This Court knows certain things: (1) Petitioner has not waived the claims being asserted in state court; (2) the state court proceeding could potentially moot this federal proceeding; (3) past experience in death cases indicates that if relief is denied in the state court, Petitioner will assert those claims in a successive petition in federal court and will probably incorporate some of the claims here asserted; (4) there is no time within which such a successive petition would have to be filed, so that what is being done on this appeal might require reconsideration on a second petition.
>
> In the interests of judicial economy, this federal proceeding should be held in abeyance until all of the claims Petitioner wants to assert are exhausted and brought before a federal court.

716 F.2d at 1355.

On rehearing, the State argued that the decision would encourage habeas petitioners to implement "dilatory tactics" if they could delay a federal proceeding by commencing a collateral attack in state court. The Court rejected the State's argument by clarifying that its ruling was limited to the unusual circumstances of the case, specifically that "a

(continued...)

Dobbs' motions to amend, to expand the record, and to reopen and reconsider issues in light of new evidence will be denied.

II. Motion To Reconsider The August, 1989, Decision

Because the Court denies Dobbs' motions relating to the new evidence, the Court reviews Dobbs' motion to reconsider the August, 1989, decision in light of the evidence presented at the time. Dobbs objects to the Court's analysis of three issues: the trial court's charge regarding the jury's discretion to impose the death penalty; the jury's consideration of prior, uncounseled convictions; and the influence of racial prejudice on the proceedings.

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[2](...continued)
state court had seen sufficient merit in an unexhausted claim to direct an evidentiary hearing, and no federal stay of execution was involved." 739 F.2d at 530-31. The Court stated further that its decision "was grounded in judicial economy and with full knowledge that a decision on this appeal might not terminate this litigation and might be rendered moot." Id. at 531.

Certainly, a decision on appeal from the instant case might not terminate this litigation, as Dobbs may seek relief from the state courts. Nevertheless, this Court's evaluation of the issues to be litigated in state court does not lead it to conclude that a decision on appeal might be rendered moot. Although Dobbs has unearthed additional evidence, the Court does not believe that evidence impacts sufficiently on the issues properly before it such that the federal proceedings should be held in abeyance. The Court expresses no comment on the merit of those issues, however, and bases its evaluation solely on the current state of affairs.

A. Channeling the Jury's Discretion

Dobbs argues that this Court misconstrued his claim that the trial court failed to properly charge the jury on the nature of their discretion in deciding on the proper penalty, and highlights portions of the charge where the trial court told the jury that they had "absolute discretion" and that "no standards" existed. Although the trial judge did make those statements, Dobbs has taken them out of context: the judge was informing the jury that once an aggravating factor is found, the jury has wide discretion to determine the proper punishment. Given that the judge instructed the jury properly on the role of aggravating and mitigating circumstances, that Dobbs was not prevented from presenting anything in mitigation, and that the proceedings were bifurcated, the Court rejects Dobbs' comparison of his case to the situation in Furman v. Georgia, 408 U.S. 238 (1972).

B. Prior Convictions Claim

In arguing that this Court should reconsider the prior convictions claim, Dobbs maintains that this Court inappropriately raised a defense for the State by reasoning that the jury charge removed the convictions from the jury's deliberations. In its brief, the State had argued that the claim had not been presented to the state court or in Dobbs' federal petition, and should therefore be denied. The State

argued alternatively that the convictions were properly admitted.

The Court chose to pretermit the State's procedural arguments and rule on the merits of the issue. Based on its independent review of the entire charge, the Court found that it need not reach the admissibility of the convictions because the jury was instructed not to consider them, and that the only aggravating factor argued by the State was that the murder was committed during an armed robbery. Dobbs has selected portions of the court's charge to show that the jury could have been misled, but the fact remains that the jury was unambiguously informed that the only aggravating factor they could consider was the armed robbery. The Court therefore adheres to its analysis of the prior convictions issue.

C. Racial Prejudice

Dobbs objects to much of the Court's analysis of his racial prejudice claim. The Court responds to his five objections as follows:

1. The Court did not apply the wrong standard in deciding Dobbs' Eighth Amendment claim. Under McCleskey v. Kemp, 481 U.S. 279 (1987), Dobbs must show an unacceptable risk that race may have affected the sentencing decision. Contrary to Dobbs' contention, the

standard presents a subjective issue of whether the particular decision makers in his case harbored prejudices that created an unacceptable risk, and the Court examined the evidence on that basis. McCleskey put to rest any notion that a court should apply an objective standard regarding the impact of race relations on a particular trial. If the statistics in McCleskey were insufficient to show an unacceptable risk that race was a factor in McCleskey's particular trial, then Dobbs' argument that the decision makers in his case were prejudiced due to their backgrounds is similarly insufficient, standing alone, to infer the requisite unacceptable risk. See McCleskey, 481 U.S. at 313 (in rejecting McCleskey's Eighth Amendment challenge, the Court wrote: "where the discretion that is fundamental to our criminal process involved, we decline to assume that what is unexplained is invidious.").

The Court stands by its legal ruling that Dobbs must show particularized, i.e. subjective, prejudice to succeed on his Eighth Amendment claim.[3]

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[3] For that reason, for example, the testimony of Dr. Willingham concerning the racial climate of Walker County at the time of the trial does not carry much weight on the issue presented. Dobbs may disagree with the Supreme Court's reasoning in McCleskey, but the Court must adhere to that ruling.

2. The Court carefully balanced Dobbs' constitutional right to a fair trial against the interests underlying Rule 606(b) and devised a measure for determining when, and to what extent, the statutory privilege for juror communications must give way in a capital habeas case involving allegations of racial prejudice in the sentencing decision. Rule 606(b) implicates important interests, and the Court therefore rejects Dobbs' contention that Rule 606(b) is unconstitutional as applied to capital habeas petitioners making allegations of racial prejudice.

3. Dobbs' trial attorney was not a decision maker for purposes of Dobbs' constitutional challenge to the imposition of the death penalty. Any claim that the attorney's racial prejudices affected the outcome of Dobbs' trial fall under an ineffective assistance claim, not discrimination in the selection of the death penalty.

4. Similarly, the trial judge was not a decision maker in the selection of the death penalty. A claim that a trial judge harbored racial prejudices that harmed the defendant should be made under challenges to evidentiary

rulings, to the jury charge, or to the manner in which the trial was conducted.[4]

The prosecutor, on the other hand, was a decision maker to the extent that he chose to seek the death penalty. Dobbs, however, has not alleged selective prosecution, and challenges to the prosecutor's conduct fall under claims of prosecutorial misconduct and/or unconstitutional comments.

5. Finally, the Court exhaustively reviewed the evidence presented and found that it did not satisfy the standards for finding racial discrimination in the sentencing decision, under either the Equal Protection Clause or the Eighth Amendment. Upon additional reflection, the Court stands by its analysis.

III. Conclusion

At various points in his motion to reconsider, Dobbs intimates that this Court abdicated its responsibility to fairly review the record for constitutional error. Over the past ten years, the Court has spent innumerable hours

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[4] Dobbs did allege that the judge made racial slurs during the trial and that those comments affected the sentencing decision. The Court considered his argument in its prior order, and rejected it for reasons provided therein.

reviewing Dobbs' claims and has permitted extensive discovery -- even after final judgment had been issued -- so that the claims could be heard fully.

The Court is, of course, aware that this is a death penalty case, and that fact was weighed quite heavily in its deliberations. Dobbs should be aware that the rules of evidence and procedure, which are as enforceable in a capital case as in any other case, have been stretched in his favor during the course of this litigation. Further, in resolving many issues of first impression, the Court is bound by cases that, without a doubt, prescribe very heavy evidentiary burdens for habeas petitioners.

After considering all the arguments of the parties and combing the record numerous times, the Court concludes that its legal analyses are sound based on the rules prescribed by the higher courts and that its evaluation of the evidence on the various claims is fair and accurate.

ACCORDINGLY, Dobbs' motions to expand the record, to amend his petition, to reopen issues, and to alter or amend judgment are DENIED. Because the Court finds that further hearings are not necessary to resolve the issues presented, Dobbs' requests for additional oral argument are DENIED.

IT IS SO ORDERED, this the 12 day of March, 1990.

Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX "E"

RECEIVED NOV 1 3 1990

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 1 1990
MIGUEL J. CORTEZ
CLERK

No. 90-8352

WILBURN DOBBS,

Petitioner-Appellant,

versus

WALTER D. ZANT, Warden, Georgia
Diagnostic and Classification Center,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

O R D E R:

Appellant's motion to file his initial brief out of time is denied.

Appellant's motion to file an oversized brief not exceeding 98 pages is denied.

Appellant's motion to supplement the record on appeal is denied.

Appellant is allowed until 5 p.m. on November 26, 1990 to file a brief which meets the requirements of the court's rules.

Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 12 1990
MIGUEL J. CORTEZ
CLERK

No. 90-8352

WILBURN DOBBS,

Petitioner-Appellant,

versus

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

Before FAY, HATCHETT and CLARK, Circuit Judges.

BY THE COURT:

Appellant's motion for limited remand is denied.

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APPENDIX "F"

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CORRECTED

Wilburn DOBBS, Petitioner–Appellant,

v.

Walter D. ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent–Appellee.

No. 90–8352.

United States Court of Appeals, Eleventh Circuit.

Oct. 25, 1991.

Murder defendant who was sentenced to death sought federal habeas corpus relief. The United States District Court, Northern District of Georgia, set aside death sentence subject to state's right to reinstitute sentencing procedures, and state and defendant appealed. The Court of Appeals, 790 F.2d 1499, reversed in part, affirmed in part and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals, 809 F.2d 750, modified opinion in part and denied petition. On remand, the District Court, No. 4:80–CV247–HLM, Harold L. Murphy, J., 720 F.Supp. 1566, denied petition, and that court subsequently denied defendant's motions to expand record, for leave to amend petition, and to reopen and reconsider. Defendant appealed. The Court of Appeals held that: (1) defendant failed to demonstrate constitutionally unacceptable risk that racial prejudice affected sentencing; (2) jury charge sufficiently informed jury on requirement of finding statutory aggravating circumstances and requirement for considering mitigating circumstances; (3) trial court's instruction to jury not to consider defendant's prior convictions, which defendant claimed were constitutionally invalid, showed that convictions did not affect sentencing decision; and (4) trial court did not constitutionally err in refusing to answer jury's question regarding defendant's parole eligibility.

Affirmed.

1. Homicide ⇐356

Murder defendant sentenced to death failed to demonstrate constitutionally unacceptable risk that racial prejudice affected sentencing, even though certain of jurors' statements revealed racial prejudice, trial judge and defense lawyer referred to defendant as "colored" and as "colored boy," and political scientist stated that racial prejudice existed in county, which was 96% white; jurors denied that race had any affect on their decision and nothing in record indicated that jurors acted with purposeful discrimination. U.S.C.A. Const. Amends. 8, 14.

2. Criminal Law ⇐1213.8(8)

To show that risk of racial prejudice influencing sentencing violated Eighth Amendment, murder defendant who was sentenced to death had to show that racial prejudice actually affected jury's decision. U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐1180

Court of Appeals' prior determination rejecting capital murder defendant's claim that his trial counsel provided ineffective assistance during sentencing phase was law of case and, therefore, bound Court, as belatedly discovered sentencing transcript purportedly showing that counsel failed to present mitigating evidence or make closing argument in mitigation had not been included in record on appeal. U.S.C.A. Const.Amend. 6.

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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

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4. Criminal Law ⇐92

District court did not abuse its discretion in denying capital murder defendant's motion to reopen and reconsider his ineffective assistance claim following belated discovery of sentencing phase transcript, as issue had been decided prior to Court of Appeals' remand, which limited district court's consideration to issues upon which district court had reserved judgment; under law of case doctrine, district court had no basis upon which to reconsider allegation which had become final or to reopen issue which was not properly before it.

5. Criminal Law ⇐822(1)

When whole charge to jury during sentencing phase of capital murder prosecution was considered, charge sufficiently informed jury on requirement of finding statutory aggravating circumstances and requirement for considering mitigating circumstances; particular instructions to which defendant objected, when read in context, simply informed jury that once it found aggravating factor, it had wide discretion to determine punishment.

6. Criminal Law ⇐822(1)

In evaluating propriety of trial court's sentencing instructions, entire charge must be examined in context.

7. Homicide ⇐311

Trial court's instruction to jury in capital murder prosecution not to consider defendant's prior convictions, which defendant claimed were constitutionally invalid, showed that convictions did not affect sentencing decision.

8. Criminal Law ⇐1134(6)

District court is not precluded from basing legal conclusion on argument which neither party has specifically raised.

9. Criminal Law ⇐863(1)

Trial court did not constitutionally err in refusing to answer jury's question in capital murder prosecution regarding defendant's parole eligibility.

10. Criminal Law ⇐957(1)

Jurors' testimonies concerning their deliberations in capital murder prosecution were inadmissible; testimonies allegedly supported claim that jurors thought that defendant would not in fact be executed and that jury unconstitutionally imposed death penalty due to arbitrary factor. Fed. Rules Evid.Rule 606(b), 28 U.S.C.A.

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and HATCHETT, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

In this capital case, we affirm the district court's denial of habeas corpus relief.

FACTS AND PROCEDURAL HISTORY

On December 14, 1973, Wilburn Dobbs, the appellant, and two other men robbed Roy Sizemore's grocery store. During the armed robbery, Dobbs shot and killed Sizemore.[1] On May 22, 1974, a jury in the

1. The Georgia Supreme Court's opinion on direct review details the evidence presented at trial. *See Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976), *cert. denied*, 430 U.S. 975, 97 S.Ct. 1667, 52 L.Ed.2d 370 (1977). We discuss

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Superior Court of Walker County, Georgia, convicted Dobbs on two counts of aggravated assault, two counts of armed robbery, and one count of murder. That court sentenced Dobbs to death for the murder conviction. Dobbs appealed the convictions and the death sentence to the Georgia Supreme Court, which affirmed. *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976), *cert. denied*, 430 U.S. 975, 97 S.Ct. 1667, 52 L.Ed.2d 370 (1977). In 1977, Dobbs petitioned the superior court for a writ of habeas corpus, but the superior court denied relief. *Dobbs v. Hopper*, No. 77–185 (Tattnall Super.Ct., Oct. 9, 1979). Dobbs then filed an application for probable cause to appeal the superior court ruling, but the Georgia Supreme Court denied the application. The United States Supreme Court denied Dobb's petition for writ of *certiorari*. *Dobbs v. Hopper*, 447 U.S. 930, 100 S.Ct. 3029, 65 L.Ed.2d 1125 (1980).

While his state habeas corpus petition was pending, Dobbs filed an extraordinary motion for new trial, which the superior court denied. *Georgia v. Dobbs*, No. 8403 (Walker Super.Ct., Aug. 13, 1979). The Georgia Supreme Court affirmed this decision, and the United States Supreme Court denied *certiorari*. *Dobbs v. State*, 245 Ga. 208, 264 S.E.2d 18 (Ga.), *cert. denied*, 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed.2d 267 (1980).

In December, 1980, Dobbs filed a petition for writ of habeas corpus in the District Court for the Northern District of Georgia, pursuant to 28 U.S.C. § 2254. The district court denied relief for alleged constitutional errors in the guilt phase of the trial, but granted relief from the death sentence on the ground that the superior court's instructions regarding the function of mitigating circumstances were constitutionally deficient.[2]

On appeal, this court reversed the district court's grant of relief and remanded the case to the district court for consideration of the sentencing phase claims on which it had reserved decision. *Dobbs v. Kemp*, 790 F.2d 1499 (11th Cir.1986), *modified*, 809 F.2d 750 (1987), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987). The district court denied relief on the reserved issues. *Dobbs v. Zant*, 720 F.Supp. 1566 (N.D.Ga.1989).

On October 11, 1989, during a search of the superior court reporter's storage building, Dobbs's lawyers found stenographic notes of the closing arguments made at Dobbs's sentencing hearing which had previously been missing. In light of the notes' contents, Dobbs filed a motion to expand the record, a motion for leave to amend his petition, and a motion to reopen and reconsider pursuant to Federal Rules of Civil Procedure 59 and 60. On March 6, 1990, the district court denied the motions. Dobbs filed a Notice of Appeal April 4, 1990, and two days later the district court granted a Certificate of Probable Cause to Appeal.

those facts necessary to the adjudication of the issues in the course of this opinion.

2. Because the district court granted Dobbs relief from the death sentence, it did not review six additional sentencing phase issues Dobbs raised: (1) whether the sentencing phase jury charge was constitutionally defective because it failed to limit the jury's discretion in imposing the death sentence; (2) whether the admission of Dobbs' prior convictions during the sentencing phase of his trial was constitutional error; (3) whether the trial judge's refusal to answer a question about the availability of parole during the sentencing deliberations was constitutional error; (4) whether the jury's verdict was constitutionally inadequate; (5) whether the fact that the jury allegedly sentenced Dobbs to death thinking that Dobbs would not be executed constituted constitutional error; and (6) whether Dobbs' sentence of death was imposed as a result of passion, prejudice, or other arbitrary considerations. *Dobbs v. Kemp*, 790 F.2d 1499, 1502 n. 1 (11th Cir.1986), *modified*, 809 F.2d 750 (1987), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2203, 95 L.Ed.2d 858 (1987).

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CONTENTIONS

In this appeal, Dobbs raises seven contentions. First, he contends that a constitutionally unacceptable risk existed that racial prejudice influenced the jury's sentencing decision. Second, he contends that his claim of ineffective assistance of counsel at sentencing should be reconsidered because of the late discovery of the sentencing transcript. Third, Dobbs contends that the district court abused its discretion in denying his motion to reopen and reconsider various issues, including his claim of ineffective assistance of counsel during sentencing. Fourth, he contends that the sentencing instructions were unconstitutional because they limited the jury to a consideration of only the existence of statutory aggravating circumstances. Fifth, Dobbs contends that the jury impermissibly based the imposition of the death sentence on previous unconstitutional convictions. Sixth, he contends that the trial judge's refusal to answer a question from the jury during sentencing deliberations concerning the availability of parole was constitutional error. Finally, Dobbs contends that his death sentence is invalid because the jury did not believe that he would in fact be executed.

The government contends that Dobbs has failed to make the necessary showing that racial prejudice actually influenced the sentencing determination. The government also contends that this court should decline to consider Dobbs's allegation of ineffective assistance of counsel at sentencing because it is based on a transcript not in the record. Similarly, and because we limited our earlier remand to the district court, the government contends that the district court did not abuse its discretion in denying Dobbs's motion to reopen and reconsider various issues. To the extent that the law of the case does not preclude consideration of Dobbs's challenge to the sentencing instructions, the government contends that the charge as a whole properly advised the jury of its role in imposing the death penalty. The government also contends that the use of prior convictions at Dobbs's trial did not violate his constitutional rights, that the trial court properly declined to answer the jury's question regarding the availability of parole, and that Dobbs's allegation that the jurors did not think he would be executed is based on inadmissible evidence.

ISSUES

The issues are: (1) whether the district court erred in finding no constitutionally significant risk concerning the influence of racial prejudice on Dobbs's sentence; (2) whether this court should consider Dobbs's allegation of ineffective assistance of counsel at sentencing; (3) whether the district court abused its discretion in denying Dobbs's motion to reopen and reconsider various claims; (4) whether the district court erred in finding that the sentencing instructions did not violate Dobbs's constitutional rights; (5) whether the district court erred in determining that the admission of Dobbs's prior convictions during the penalty phase of his trial was constitutional; (6) whether the district court erred in ruling that the trial court properly declined to answer the jury's question regarding the availability of parole; and (7) whether

Dobbs has established a constitutional violation through his allegation that the jurors did not think he would be executed.

DISCUSSION

I. Risk of Racial Prejudice

[1] Dobbs argues that the risk that racial prejudice influenced his sentencing hearing existed to such an extent that the imposition of the death sentence violates his right to be free of cruel and unusual punishment under the eighth amendment to the United States Constitution and violated his right to equal protection under the fourteenth amendment to the United States Constitution. According to Dobbs, his racial prejudice claim arises from the fact that he is black and his victim was white.

The United States Supreme Court has previously dealt with both an eighth amendment and a fourteenth amendment challenge to the imposition of the death sentence based on alleged racial discrimination. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (statistics indicating that racial bias may affect Georgia's capital sentencing system are insufficient to establish that the imposition of the death penalty on a black defendant for the murder of a white victim violates the eighth or fourteenth amendment). Although the petitioner in *McCleskey* brought a statistical challenge to Georgia's death penalty and Dobbs challenges the constitutionality of his death sentence in particular, the Court's analysis in *McCleskey* is relevant.

In evaluating the eighth amendment claim, the Court stated, "There is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case.... The question 'is at what point that risk becomes constitutionally unacceptable.'" *McCleskey*, 481 U.S. at 308–09, 107 S.Ct. at 1776 (quoting *Turner v. Murray*, 476 U.S. 28, 36 n. 8, 106 S.Ct. 1683, 1688 n. 8, 90 L.Ed.2d 27 (1986)). To support his challenge, Dobbs cites excerpts from the depositions of the eleven trial jurors, of whom only one was black, who were surviving at the time of the remand. Although certain of the jurors' statements revealed racial prejudice, no juror stated that he or she viewed blacks as more prone to violence than whites, or as morally inferior to whites, and their comments do not reveal otherwise.[3]

Dobbs also relies on the trial judge's background and conduct as evidence of racial prejudice affecting the jury's sentencing decision. According to Dobbs, the trial judge not only failed to provide protection from the influence of racial prejudice, but actually contributed to such influence. Dobbs notes that the trial judge was raised in a segregated environment, voted as a state legislator for laws that encouraged segregation, and referred to Dobbs during trial as "colored." Similarly, Dobbs argues that his trial lawyer's racial prejudice potentially influenced the sentencing hearing. Indeed, the district court noted that Dobbs's lawyer "expressed beliefs [in his deposition], often in pointed ways, that blacks in general are inferior to whites morally and intellectually." *Dobbs*, 720 F.Supp. at 1578. Nevertheless, Dobbs's lawyer did not express his personal views at Dobbs's trial, and neither the lawyer nor the trial judge decided Dobbs's penalty. Thus, apart from the trial judge's and defense lawyer's references to Dobbs as "colored" and "colored boy," it cannot be said that the trial judge's or the defense lawyer's racial attitudes affected the jurors' sentencing determination.

3. The district court's opinion on remand carefully details the jurors' racial views. *See Dobbs*, 720 F.Supp. at 1575–76 and nn. 10–23.

Lastly, Dobbs argues that the facts and venue of his case contributed to the risk that racial prejudice influenced the sentencing decision. Walker County, a small rural community, was at the time of the offense ninety-six percent white, all defendants were black, and the victims were white. Dobbs also introduced in the district court the testimony of a political scientist who stated the opinion that racial prejudice existed in Walker County and that race was a significant factor which affected its citizens' decisions. Such evidence, however, does not necessarily demonstrate that in Dobbs's case, a constitutionally unacceptable risk existed that racial prejudice affected the sentencing decision.

In denying relief on Dobbs's claim, the district court stated,

> After considering all the evidence, the Court concludes that Dobbs has not shown a risk of racial prejudice affecting the sentencing decision to the extent that the death penalty was given unconstitutionally. Although the jurors possess some racial prejudices, and some more so than others, Dobbs has not shown that the jurors, either individually or as a whole, were influenced by prejudices that would make them favor the death penalty for a black person who murdered a white person.

Dobbs, 720 F.Supp. at 1579 (footnote omitted). We review the district court's factual findings under a clearly erroneous standard, but subject the district court's legal conclusions to plenary review. *United States v. Alexander*, 835 F.2d 1406, 1408 (11th Cir.1988).

[2] Dobbs argues that the district court erred in requiring him to prove that racial considerations in fact affected the jurors' decision to impose the death penalty. Citing *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), Dobbs asserts that he can satisfy the burden of showing that a constitutionally unacceptable risk existed by showing that racial prejudice might have influenced the sentencing determination.

Dobbs's reliance on *Turner* is misplaced. The *Turner* Court focused on the issue of whether the trial court should have allowed questions during voir dire concerning the potential jurors' racial attitudes. The plurality opinion found that considering the ease with which the risk that the death penalty is imposed arbitrarily could have been minimized, the defendant had the right to ask the questions. In this case, however, at issue is not a prophylactic rule, but the jury's ultimate decision. Dobbs contends that the potential influence of racial prejudice upon the decision makers in his case violated his eighth amendment right. In such an instance, to show that the risk of racial prejudice influencing sentencing rose to a constitutionally unacceptable level, Dobbs must show that racial prejudice actually affected the jury's decision. After reviewing the record, we agree with the district court that Dobbs has failed to demonstrate that a constitutionally unacceptable risk existed that racial prejudice affected his sentencing.

In alleging an equal protection violation, Dobbs has the burden to "prove that the decision makers in *his* case acted with discriminatory purpose." *McCleskey*, 481

U.S. at 292, 107 S.Ct. at 1767 (emphasis in original). As noted above, Dobbs asserts only that based on the backgrounds and general racial attitudes of various participants in the trial, racial prejudice may have influenced his sentencing decision. The jurors denied that race had any effect on their decision, and nothing in the record indicates that the jurors acted with purposeful discrimination. Consequently, Dobbs's eighth and fourteenth amendment claims fail.[4]

II. Ineffective Assistance of Counsel During Sentencing

[3] We previously discussed and rejected Dobbs's claim that his trial counsel provided ineffective assistance during the sentencing phase of the trial. *See Dobbs*, 790 F.2d at 1513–14. We are bound by this determination as it is the law of the case. "Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case." *United States v. Robinson*, 690 F.2d 869, 872 (11th Cir.1982) (citations omitted). The law of the case, however, does not bar reconsideration of factual findings or legal conclusions if "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *Barber v. International Brotherhood of Boilermakers*, 841 F.2d 1067, 1072 (11th Cir.1988) (citations omitted).

Dobbs argues that the belated finding in 1989 of the sentencing transcript requires that this court reconsider its previous decision concerning ineffective assistance of counsel at the sentencing phase. According to Dobbs, this transcript establishes that his trial lawyer failed to present any evidence in mitigation or make a closing argument in mitigation; thus, this court should reconsider the previous decision to reject Dobbs's claim because such a decision was based in part on our finding that Dobbs's trial lawyer's "testimony in the district court reveals that he did make a closing argument in mitigation." *Dobbs*, 790 F.2d at 1514 n. 15.

In response, the state notes that Dobbs's entire argument is based on a transcript which has never been made a part of the record by the district court and which this court has declined to allow Dobbs to include in the record on appeal. We agree with the state's conclusion that absent inclusion of the sentencing phase transcript in the record before this court, nothing exists for this court to reconsider. Our previous decision rejecting Dobbs's ineffective assistance of counsel at sentencing claim remains the law of the case.

III. Motion to Reopen and Reconsider

[4] After discovering the sentencing phase transcript, Dobbs filed a motion with the district court to reopen and reconsider his ineffective assistance of counsel claim and other issues. The district court held that

> The issues that Dobbs want reopened ... were decided prior to the Eleventh Circuit's remand. The remand order limited this Court's consideration to issues upon which this Court had reserved judgment. If Dobbs wants to present additional evidence on other issues, he must do so in a separate proceeding.
>
> ....
>
> [T]o the extent that the claims Dobbs wants reconsidered are based on the closing arguments at the sentencing phase, they should be heard initially in state court.

As noted above, under the law of the case doctrine, the district court had no basis upon which to reconsider an allegation which had become final or to reopen an issue which was not properly before it. The district court did not abuse its discretion in denying Dobbs's motion to reopen and reconsider. *See United States v. Esle*, 743 F.2d 1465, 1475 (11th Cir.1984) (district court's denial of motion to reopen or reconsider is reviewed for abuse of discretion).

IV. Sentencing Phase Instructions

[5] Dobbs argues that the jury instructions concerning mitigation were unconstitutional because they established an incorrect standard for determining whether the death penalty should be imposed. According to Dobbs, the instructions unconstitutionally informed the jury that the only standard they would be permitted to consider would be the existence of statutory aggravating circumstances. Dobbs objects specifically to the following language:

> Now I instruct you our law says in arriving at your verdict in these cases, beyond prescribing the limits which a jury can go, the law provides no standards for the guidance of the jury in the selection of the penalty but rather commits the whole matter of determining which penalty shall be fixed to the judgment, conscience and absolute discretion of the jury.
>
> The only standard, if any, that you will be permitted to consider in arriving at whether or not you will inflict the death penalty is the question of whether or not you find beyond a reasonable doubt that this defendant committed the offense of murder while engaged in the commission of another capital felony.

In our previous decision, we held that "[c]onsidering the entire charge in context, we are confident that no reasonable juror could have misunderstood the nature and function of mitigating circumstances and its role in evaluating mitigating evidence in argument. Thus, ... the trial court's jury instructions were not constitutionally deficient." *Dobbs*, 790 F.2d at 1513. Dobbs maintains that his argument is not foreclosed by the law of the case because this circuit's previous decision concerned only the definition of the nature and function of mitigating circumstances. According to Dobbs, the panel did not address, nor implicitly foreclose, specific issues of discretion and standards to guide the jury.

[6] Assuming that Dobbs's current challenge is not foreclosed by the law of the case, we find that the charge as a whole properly informed the jury of its role in imposing the death penalty. In evaluating the propriety of the trial court's sentencing instructions, the entire charge must be examined in context. *Peek v. Kemp*, 784 F.2d 1479, 1494 (11th Cir.) (en banc), *cert. denied*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986). When the whole charge is considered, it is clear that it sufficiently informed the jury on the requirement of finding statutory aggravat-

4. Our decision on this issue must not be interpreted to mean that we approve of the racial epithets used in this case. Our decision is based on the circumstances of this case and the fact that the racial epithets, under existing law, did not render the trial constitutionally unfair or cruel and unusual.

ing circumstances and the requirement for considering mitigating circumstances.[5] The particular instructions to which Dobbs objects, when read in context, simply inform the jury that once it finds an aggravating factor, it has wide discretion to determine the punishment.

V. Admission of Prior Convictions

[7] During the sentencing phase of Dobbs's trial, the state offered evidence of three criminal offenses of which Dobbs had previously been convicted. According to Dobbs, each prior conviction is constitutionally invalid, and his death sentence must be vacated because it is based in part on these invalid convictions. *See Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (defendant's death sentence was unconstitutionally imposed because one of the aggravating circumstances supporting the sentence was based on a prior conviction which was held invalid subsequent to the imposition of the death sentence). Specifically, Dobbs asserts that he entered a plea of guilty to shoplifting without the assistance of counsel and the court sentenced him to seven months imprisonment. Likewise, he asserts that he entered a plea of guilty to possession of forged checks without the assistance of counsel and the court sentenced him to two years in prison, and that he entered a plea of guilty to escape and the indictment erroneously reflected that he escaped while serving time for the felony of forgery. Dobbs also argues that his pleas were involuntary and that the state introduced the convictions at his sentencing hearing without providing notice as required by Georgia law. *See Gates v. State*, 229 Ga. 796, 194 S.E.2d 412, 414 (1972).

[8] In denying relief, the district court held that

> in its charge to the jury, the trial court unambiguously stated that the evidence of prior convictions could not be considered during the death penalty deliberations. Further, as the Eleventh Circuit has found, the trial court charged the jury that the only aggravating factor argued by the State was that the murder was committed while Dobbs was engaged in the commission of another capital felony.
>
> ....
>
> The Court concludes that the trial court's instruction to the jury not to consider the prior convictions shows that the convictions did not affect the sentencing decision.

5. At the beginning of the charge on punishment for murder, the trial court instructed the jury,

> Before you would be authorized to fix a sentence which would require the Court to sentence him to death by electrocution, you would have to find beyond a reasonable doubt that one of the aggravating circumstances which the Legislature had provided for in capital felonies where the death sentence can be imposed and where the death sentence is asked for, have provided [sic] ten different statutory aggravating circumstances....
>
> You would have the authority to return a verdict of death by electrocution if you found beyond a reasonable doubt that in this case the offense of murder was committed while this defendant was engaged in the commission of another capital felony....
>
> ....
>
> [N]ow it will also be necessary if your verdict on Count V is death by electrocution, you must in writing write out the statutory ground which you find him to be guilty of in arriving at the verdict of death by electrocution, you will have that with you in writing, that statutory ground which the Court has authorized you to consider if you see fit to do so.

Dobbs, 720 F.Supp. at 1568–69 (citations omitted). Dobbs incorrectly argues that because the state did not forward such a rationale, the district court improperly relied on it. The district court is not precluded from basing a legal conclusion on an argument which neither party has specifically raised. After reviewing the record, we agree with the district court's curative instruction analysis.

VI. The Jury's Consideration of the Availability of Parole

[9] During sentencing deliberations, the jury foreman asked the trial judge, "We the jury would like to know on the—say a felony from 1 to 10 years, we would sentence them to 10 years, would he be eligible for parole within that 10 years?" The trial court refused to answer the question. According to Dobbs, the jury therefore considered the possibility of parole in its decision to sentence him to death. He argues that the trial court's failure to answer the jury's question contravenes "the policy of the law [of Georgia] that the jury should not be influenced in a criminal case in the rendition of their verdict by a consideration of the fact that the penalty imposed by them might be commuted by the State Board of Pardons and Paroles." *McGruder v. State*, 213 Ga. 259, 98 S.E.2d 564, 569 (1957).

"[D]efendants in the sentencing phase of a capital murder trial have no federal right to prevent jury consideration of the possibility that they will be paroled if sentenced to life imprisonment. Consequently, the trial court's failure to instruct [the defendant's] jury to disregard that possibility could not have violated the Constitution." *Tucker v. Zant*, 724 F.2d 882, 892 (11th Cir.1984), *vacated on other grounds*, 474 U.S. 1001, 106 S.Ct. 517, 88 L.Ed.2d 452 (1985). Accordingly, the trial court did not commit constitutional error in refusing to answer the jury's question regarding parole.

VII. The Jury's Belief Concerning the Execution of the Death Penalty

[10] At the time of Dobbs's trial, the United States Supreme Court had held Georgia's application of its death penalty statute unconstitutional. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Only two years subsequent to Dobbs's trial did the Court again permit the imposition of the death penalty under revised Georgia statutes. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Dobbs argues that the jurors at his trial therefore thought that Dobbs would not in fact be executed, and that the jury unconstitutionally imposed the death penalty due to an arbitrary factor. Dobbs attempts to support his contention by citing to the jurors' deposition testimonies. The district court correctly rejected Dobbs's claim because the jurors' testimonies concerning their deliberations are inadmissible pursuant to the Federal Rules of Evidence 606(b).[6]

6. Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any

CONCLUSION

For the reasons stated, we affirm the district court's denial of Dobbs's petition for a writ of habeas corpus.[7]

AFFIRMED.

statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. (West 1991).

7. The Petition for Rehearing and Suggestion of Rehearing En Banc filed November 22, 1991 is denied.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 15 1992
MIGUEL J. CORTEZ
CLERK

No. 90-8352

WILBURN DOBBS,

Petitioner-Appellant,

versus

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

O R D E R:

Appellant's motion to stay the mandate to and including August 3, 1992, is **GRANTED.**

/s/JOSEPH W. HATCHETT
UNITED STATES CIRCUIT JUDGE

STATE OF [illegible]IA,
COUNTY OF WALKER:

AFFIDAVIT

PERSONALLY APPEARED BEFORE THE UNDERSIGNED ATTESTING OFFICER, AUTHORIZED TO ADMINISTER OATHS, E. DON TOWNS, WHO, AFTER BEING DULY SWORN, DEPOSES ON OATH AND SAYS AS FOLLOWS:

MY NAME IS E. DON TOWNS AND I AM A CERTIFIED COURT REPORTER, APPOINTED AS THE OFFICIAL COURT REPORTER FOR THE SUPERIOR COURTS OF THE LOOKOUT MOUNTAIN JUDICIAL CIRCUIT. IN THIS CAPACITY I WAS RESPONSIBLE FOR REPORTING AND TRANSCRIBING THE TESTIMONY AND EVIDENCE IN THE CASE OF THE STATE OF GEORGIA VS. WILBURN WILEY DOBBS, INDICTMENT NO. 8403 IN THE SUPERIOR COURT OF WALKER COUNTY, GEORGIA.

DURING THE TRIAL OF THAT CASE, I DID NOT REPORT THE CLOSING ARGUMENT GIVEN BY THE DISTRICT ATTORNEY AT THE SENTENCING PHASE OF THAT TRIAL. HOWEVER, I FURTHER STATE AND AFFIRM THAT DURING THAT PERIOD AND FOR A SUBSTANTIAL PERIOD OF THE TIME PRIOR TO THAT TRIAL AND SINCE THAT TIME IT WAS MY PRACTICE, AS A CERTIFIED COURT REPORTER AND AS THE OFFICIAL COURT REPORTER OF THAT COURT TO NOTE AND TRANSCRIBE ALL OBJECTIONS MADE BY EITHER COUNSEL DURING THE ARGUMENT PHASE OF THE TRIAL. IN REVIEWING MY NOTES OF THAT TRIAL, I FIND THAT NO OBJECTIONS AS TO ANY COMMENTS MADE BY THE DISTRICT ATTORNEY WERE INTERPOSED DURING THE CLOSING ARGUMENT AT THE SENTENCING PHASE OF THAT TRIAL. I FURTHER STATE AND AFFIRM THAT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION, THERE WERE NO OBJECTIONS INTERPOSED BY EITHER SIDE DURING THE ARGUMENT MADE ON THE SENTENCING PHASE OF THE TRIAL. FINALLY, I AM ABLE TO STATE, TO THE BEST OF MY KNOWLEDGE AND BELIEF, THAT HAD ANY OBJECTION BEEN INTERPOSED AT ANY PHASE OF THE DISTRICT ATTORNEY'S CLOSING ARGUMENT ON SENTENCING, THAT I WOULD IN FACT HAVE MADE A NOTE OF THAT OBJECTION AND COUNSEL'S COMMENTS AS TO THAT OBJECTION.

THIS AFFIDAVIT IS GIVEN FOR WHATEVER PURPOSES EITHER PARTY MAY HAVE IN THE APPEAL OF THE CASE NOW PENDING IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA STYLED WILBURN DOBBS V. ZANT, SAME BEING CASE NO. C80-247R.

FURTHER DEPONENT SAYETH NOT.

E. Don Towns

E. DON TOWNS

SWORN TO AND SUBSCRIBE BEFORE ME
THIS 12th DAY OF February, 1981.

Shirley W. McDonald
NOTARY PUBLIC

STATE OF GEORGIA,
COUNTY OF CATOOSA:

PERSONALLY APPEARED BEFORE THE UNDERSIGNED ATTESTING OFFICER, AUTHORIZED BY LAW TO ADMINISTER OATHS, J. DONALD BENNETT, WHO, AFTER BEING DULY SWORN, DEPOSES ON OATH AND SAYS AS FOLLOWS:

MY NAME IS J. DONALD BENNETT AND I AM AN ATTORNEY AT LAW DULY LICENSED TO PRACTICE LAW IN THE STATE OF GEORGIA. IN 1974, I WAS APPOINTED TO REPRESENT WILBURN WILEY DOBBS IN HIS CASE CHARGING HIM WITH MURDER IN INDICTMENT NO. 8403 IN THE SUPERIOR COURT OF WALKER COUNTY, GEORGIA. TO THE BEST OF MY KNOWLEDGE AND BELIEF, I DO NOT RECALL ENTERING OR INTERPOSING ANY OBJECTION DURING THE CLOSING ARGUMENT OF THE DISTRICT ATTORNEY MADE AT THE SENTENCING PHASE OF THE TRIAL. I FURTHER STATE AND AFFIRM THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF THAT, HAD I INTERPOSED AN OBJECTION OF ANY SORT DURING THAT ARGUMENT, THAT, FOR THE PURPOSE OF PROTECTING THE DEFENDANT'S RIGHT, I WOULD HAVE RAISED THE ISSUE ON DIRECT APPEAL.

I FURTHER STATE AND AFFIRM THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF, THE COURT REPORTER ASSIGNED TO REPORT THE TRIAL DID NOT TRANSCRIBE OR REPORT THE CLOSING ARGUMENTS OF EITHER COUNSEL MADE AT THE SENTENCING PHASE OF THE TRIAL.

FURTHER DEPONENT SAYETH NOT.

J. Donald Bennett
J. DONALD BENNETT

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 9th DAY OF February, 1981.

Debra Traffanstedt
NOTARY PUBLIC

STATE OF G IA,
COUNTY OF WALKER:

AFFIDAVIT

PERSONALLY APPEARED BEFORE THE UNDERSIGNED ATTESTING OFFICER, AUTHORIZED BY LAW TO ADMINISTER OATHS, ROBERT E. COKER, WHO, AFTER BEING DULY SWORN, DEPOSES ON OATH AND STATES AS FOLLOWS:

THAT MY NAME IS ROBERT E. COKER AND THAT I AM NOW A SENIOR JUDGE IN THE SUPERIOR COURT OF THE LOOKOUT MOUNTAIN JUDICIAL CIRCUIT. PRIOR TO MY RETIREMENT ON DECEMBER 31, 1980, I WAS A SUPERIOR COURT JUDGE FOR THE LOOKOUT MOUNTAIN JUDICIAL CIRCUIT. IN THAT CAPACITY, I PRESIDED OVER THE TRIAL OF THE CASE OF THE STATE OF GEORGIA V. WILBURN WILEY DOBBS, WHICH CASE WAS BEFORE THE COURT ON INDICTMENT NO. 8403 IN THE SUPERIOR COURT OF WALKER COUNTY, GEORGIA, CHARGING THE DEFENDANT WITH THE OFFENSE OF MURDER. TO THE BEST OF MY RECOLLECTION, KNOWLEDGE AND BELIEF I DO NOT RECALL ANY OBJECTIONS INTERPOSED BY COUNSEL FOR THE DEFENDANT DURING THE DISTRICT ATTORNEY'S CLOSING ARGUMENT AT THE SENTENCING PHASE OF THE DEFENDANT'S TRIAL. I FURTHER STATE AND AFFIRM THAT DURING THAT PERIOD OF TIME WHEN THE TRIAL WAS IN SESSION IT WAS NOT REQUIRED BY LAW NOR WAS IT A LOCAL RULE OF THE COURT TO REQUIRE THE REPORTING OF CLOSING ARGUMENTS IN FELONY CASES. NEVERTHELESS, TO THE BEST OF MY RECOLLECTION THE OFFICIAL COURT REPORTER, DON E. TOWNS, DID IN FACT REPORT AND LATER TRANSCRIBE THE CLOSING ARGUMENTS OF COUNSEL FOR THE STATE AT THE GUILT AND INNOCENCE PHASE OF THE TRIAL. FURTHER, IT WAS THAT REPORTER'S POLICY AND IT WAS A LOCAL RULE OF THIS COURT THAT ALL OBJECTIONS INTERPOSED BY COUNSEL FOR EITHER SIDE DURING FINAL ARGUMENTS IN ANY CRIMINAL CASE WERE IN FACT REPORTED AND AT THE REQUEST OF THE

COUNSEL TRANSCRIBED. FINALLY, TO THE BEST OF MY RECOLLECTION, KNOWLEDGE AND BELIEF, I DO NOT RECALL ANY UNTOWARD OR PREJUDICIAL COMMENTS MADE BY THE DISTRICT ATTORNEY DURING THE CLOSING ARGUMENT MADE TO THE JURY AT THE SENTENCING PHASE OF THE TRIAL.

FURTHER DEPONENT SAYETH NOT.

Robert E. Coker
ROBERT E. COKER, SENIOR JUDGE
LOOKOUT MOUNTAIN JUDICIAL CIRCUIT

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 27th DAY OF Feb., 1981.

V. Willadean Budgen
NOTARY PUBLIC

APPENDIX "I"

MR. BENNETT: If it please the Court, the Supreme Court of the United States in 1972 held that the death penalty was unconstitutional on the ground that it inflicted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment of the United States.

The opinion is some, oh, I would say, a hundred and thirty-five pages long in striking down the Georgia death statute. They struck down most of the statutes throughout the United States which provided for death punishment. They struck down these statutes, if I could consolidate a hundred and thirty-five pages into a few words, on the ground that the punishment was cruel in that it was arbitrarily imposed by a jury because it was left to the discretion of the jury.

They held that it was unusual in that it was so seldom executed.

I won't try to go into -- I might add however, that since the decision in 1972, many of the states, including Georgia, have enacted new statutes providing for the death sentence, and of course, these statutes will also be attacked, but what action the Supreme Court will take on them, I do not know.

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But, I wanted to give you this very briefly, the thinking of the Supreme Court when they rendered their decision in 1972. They pointed out first that as far as actual executions were concerned, there were very few. Now, since 1967, there has been more or less a moratorium as far as death sentences are concerned, I don't believe anyone has been executed since 1967.

Justice Brennan, and everything that I would read is from Justice Brennan's opinion, stated that even before the moratorium on exeuctions ban in 1967, executions totaled only forty-two in 1961, forty-seven in 1962, an average of less than one per week. The number dwindled from twenty-one in 1963 to fifteen in 1964 to seven in 1965, and in 1966 there was one execution, and in 1967 there were two.

Furman
92 S.Ct. @ 2754 (attached)

It says when a country of over two hundred million people inflict an unusually severe punishment no more than fifty times a year, the inference is strong that the punishment is not being regularly and fairly applied, to disspell it would indeed require a clear showing of non-arbitrary infliction.

92 S.Ct. @ 2750

Justice Brennan states that I will analyze

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...e punishment of death in t...ms of principles set out above and cumulative tests to which they lead. It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated that it does not regard as acceptable, and that cannot be shown to serve any penal purpose, more effectively than a significantly less drastic punishment.

Under these principles, this test under these principles and this test, death today is a cruel and unusual punishment. Death is unique, it is a unique punishment in the United States in a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction.

This natural human feeling appears all about us, there has been no national debate about punishment in general or by imprisonment comparable to the debate about punishment of death, no other punishment has been so continuously restricted nor has any state abolished prisons as some have abolished punishment by death. And those states that still inflict death reserve it for the most heinous

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92 S.Ct. @ 2750

...imes.

Jurors, of course, have always treated cases differently as have governors exercising their commutation powers. Criminal defendants are of the same view, as all practicing lawyers know who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty.

Some legislatures have required particular procedures such as two stage trials as we have here, and automatic appeals applicable only in death cases.

It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special consideration.

92 S.Ct. @ 2751

This Court too, that is, the Unites States Supreme Court, always treats death penalty cases as a class apart, and the unfortunate effect of this punishment upon the function of the judicial process is well-known. No other punishment has a similar effect. The only explanation for the uniqueness of death is it's extreme severity.

Death is today an unusually severe punishment, unusual in its pain, in its finality,

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in its enormity, no other existing punishment is comparable to death in terms of physical and mental suffering.

Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. Since the discontinuance of floggings as a constitutional permissible punishment, death remains the only punishment that may be -- may involve the conscious infliction of physical pain.

In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death for the prospect of pending execution extracts a frightful toll during the inevitable long wait during the imposition of sentence and the actual infliction of death. As the California Supreme Court pointed out, the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

92 S.Ct @ 2752

Indeed, as Mr. Justice Frankfurter noted, the onset of insanity, awhile awaiting execution of a death sentence, is not a rare phenomenon.

The fate of every increasing fear and distress to which the expatriate is subjected can

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only exist to a greater degree for a person confined in prison awaiting death. The unusual severity of death is manifested more clearly in its finality and enormity. Death in these respects is in a class by itself. Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.

The contrast with the plight of a person punished by imprisonment is evident, an individual in prison does not lose the right to have rights. A prisoner retains, for example, the constitutional right to free exercise of religion, to go free of cruel and unusual punishment and treatment as a person, for purposes of due process of law and equal protection of the laws.

A prisoner remains a member of the human family, moreover, he retains the right of access to the courts. His punishment is not irrevocable, apart from the common charge grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the

92 S.Ct. @ 2753

lot of men whose convictions were

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unconstitutionally secured in view of later retroactively applied holdings of this Court. 92 S.Ct. @ 2753

The punishment itself may have been unconstitutionally inflicted, yet the finality of death precludes relief, an executed person has indeed lost the right of rights as the nineteenth century proponent of punishing criminals by death declared, when a man is hung, there is an end to our relations with him. His execution is a way of saying you are not fit for this world, take your chance elsewhere.

I'm sure that all you, in considering this man's sentence, will be judged by your conscience. I can only ask that in considering the punishment, that you inflict one that you feel that you can live with.

Thank you.

MR. SELF: I'll be very brief with you in this case. Shakespeare once said nothing in bold and sin so much as mercy, it's better to use the head instead of or in place of the heart, or it may be said another way, sterness may result in the immediate harshness but may be, in the long run, be far more merciful to society.

Now, a jury, when it serves as a jury, is doing

APPENDIX "J"

136 U.S., at 447–449, 10 S.Ct., at 933–934.[31] In Louisiana ex rel. Francis v. Resweber, *supra*, the Court approved a second attempt at electrocution after the first had failed. It was said that "[t]he Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner." 329 U.S., at 463, 67 S.Ct., at 376, but that the abortive attempt did not make the "subsequent execution any more cruel in the constitutional sense than any other execution." *Id.*, at 464, 67 S.Ct., at 376.[32] These three decisions thus reveal that the Court, while ruling upon various methods of inflicting death, has assumed in the past that death was a constitutionally permissible punishment.[33] Past assumptions, however, are not sufficient to limit the scope of our examination of this punishment today. The constitutionality of death itself under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never directly considered it.

The question, then, is whether the deliberate infliction of death is today consistent with the command of the Clause that the State may not inflict punishments that do not comport with human dignity. I will analyze the punishment of death in terms of the principles set out above and the cumulative test to which they lead: It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a "cruel and unusual" punishment.

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. No other punishment has been so continuously restricted, see *infra*, at 2758–2767, nor has any State yet abolished prisons, as some have abolished this punishment. And those States that still inflict death reserve it for the most heinous crimes. Juries, of course, have always treated death cases differently, as have governors exercising their commutation powers. Criminal defendants are of the same view. "As all practicing lawyers know, who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty." Griffin v. Illinois, 351 U.S. 12, 25, 76 S.Ct. 585, 595, 100 L.Ed. 891 (1956) (Burton and Minton, JJ., dissenting). Some legislatures have required particular procedures, such as two-stage trials and automatic appeals, applicable only in death cases. "It is

31. Cf. McElvaine v. Brush, 142 U.S. 155, 158–159, 12 S.Ct. 156, 158, 35 L.Ed. 971 (1891):

"We held in the Case of *Kemmler* . . . that as the legislature of the state of New York had determined that [electrocution] did not inflict cruel and unusual punishment, and its courts had sustained that determination, we were unable to perceive that the state had thereby abridged the privileges or immunities of petitioner, or deprived him of due process of law."

32. It was also asserted that the Constitution prohibits "cruelty inherent in the method of punishment," but does not prohibit "the necessary suffering involved in any method employed to extinguish life humanely." 329 U.S., at 464, 67 S.Ct., at 376. No authority was cited for this assertion, and, in any event, the distinction drawn appears to be meaningless.

33. In a nondeath case, Trop v. Dulles, it was said that "in a day when it is still *widely accepted*, [death] cannot be said to violate the constitutional concept of cruelty." 356 U.S., at 99, 78 S.Ct., at 597 (emphasis added). This statement, of course, left open the future constitutionality of the punishment.

the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations." *Ibid.* See Williams v. Florida, 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970) (all States require juries of 12 in death cases). This Court, too, almost always treats death cases as a class apart.[34] And the unfortunate effect of this punishment upon the functioning of the judicial process is well known; no other punishment has a similar effect.

The only explanation *for* the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death.[35] Since the discontinuance of flogging as a constitutionally permissible punishment, Jackson v. Bishop, 404 F.2d 571 (CA8 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. Cf. Ex parte Medley, 134 U.S. 160, 172, 10 S.Ct. 384, 388, 33 L.Ed. 835 (1890). As the California Supreme Court pointed out, "the process of carrying out a verdict of death is often as degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 649, 100 Cal.Rptr. 152, 166, 493

34. "That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." Williams v. Georgia, 349 U.S. 375, 391, 75 S.Ct. 814, —, 99 L.Ed. 1161 (1955) (Frankfurter, J.). "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance." Stein v. New York, 346 U.S. 156, 196, 73 S.Ct. 1077, 1099, 97 L.Ed. 1522 (1953) (Jackson, J.). "In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1949) (Reed, J.). Mr. Justice Harlan expressed the point strongly: "I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." Reid v. Covert, 354 U.S. 1, 77, 77 S.Ct. 1222, 1262, 1 L.Ed.2d 1148 (1957) (concurring in result). And, of course, for many years this Court distinguished death cases from all others for purposes of the constitutional right to counsel. See Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942); Bute v. Illinois, 333 U.S. 640, 68 S.Ct. 763, 92 L.Ed. 986 (1948).

35. See Report of Royal Commission on Capital Punishment 1949–1953, ¶¶ 700–759, pp. 248–273 (1953); Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 19–21 (1968) (testimony of Clinton Duffy); H. Barnes & N. Teeters, New Horizons in Criminology 300–309 (3d ed. 1959); C. Chessman, Trial by Ordeal 195–202 (1955); M. DeSelle, The Power of Life and Death 84–85 (1965); C. Duffy & A. Hirschberg, 88 Men and 2 Women 13–14 (1962); B. Estelman, Death Row Chaplain 24–29, 101–104, 130–164 (1962); R. Hammer, Between Life and Death 208–212 (1969); K. Lamott, Chronicles of San Quentin 228–231 (1961); L. Lawes, Life and Death in Sing Sing 170–171 (1928); Rubin, The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty, 15 Crime & Delin. 121, 128–129 (1969); Comment, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1338–1341 (1968); Brief *amici curiae* filed by James V. Bennett, Clinton T. Duffy, Robert G. Sarver, Harry C. Tinsley, and Lawrence E. Wilson 13–14.

P.2d 880, 894 (1972).[36] Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." Solesbee v. Balkcom, 339 U.S. 9, 14, 70 S.Ct. 457, 460, 94 L.Ed. 604 (1950) (dissenting opinion). The "fate of ever-increasing fear and distress" to which the expatriate is subjected, Trop v. Dulles, 356 U.S., at 102, 78 S.Ct., at 599, can only exist to a greater degree for a person confined in prison awaiting death.[37]

The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.[38] Expatriation, for example, is a punishment that "destroys for the individual the political existence that was centuries in the development[,]" that "strips the citizen of his status in the national and international political community[,]" and that puts "[h]is very existence" in jeopardy. Expatriation thus inherently entails "the total destruction of the individual's status in organized society." *Id.*, at 101, 78 S.Ct., at 598. "In short, the expatriate has lost the right to have rights." *Id.*, at 102, 78 S.Ct., at 598. Yet, demonstrably, expatriation is not "a fate worse than death." *Id.*, at 125, 78 S.Ct., at 611 (Frankfurter, J., dissenting).[39] Although death, like expatriation, destroys the individual's "political existence" and his "status in organized society," it does more, for, unlike expatriation, death also destroys "[h]is very existence." There is, too, at least the possibility that the expatriate will in the future regain "the right to have rights." Death forecloses even that possibility. Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know

36. See Barnes & Teeters, *supra*, at 309–311 (3d ed. 1959); Camus, Reflections on the Guillotine, in A. Camus, Resistance, Rebellion, and Death 131, 131–134 (1960); C. Duffy & A. Hirschberg, 88–70, 254 (1962); Hammer, *supra*, at 222–235, 244–250, 260–272 (1969); S. Rubin, The Law of Criminal Correction 340 (1963); Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Amer.J.Psychiatry 393 (1962); Gottlieb, Capital Punishment, 15 Crime & Delin. 1, 8–10 (1969); West, Medicine and Capital Punishment, in Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 124 (1968); Ziferstein, Crime and Punishment, The Center Magazine 34 (Jan. 1968); Comment, The Death Penalty Cases, 56 Calif.L.Rev. 1268, 1342 (1968); Note, Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L.Rev. 814 (1972).

37. The State, of course, does not purposely impose the lengthy waiting period in order to inflict further suffering. The impact upon the individual is not the less severe on that account. It is no answer to assert that long delays exist only because condemned criminals avail themselves of their full panoply of legal rights. The right not to be subjected to inhuman treatment cannot, of course, be played off against the right to pursue due process of law, but, apart from that, the plain truth is that it is society that demands, even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.

38. It was recognized in *Trop* itself that expatriation is a "punishment short of death." 356 U.S., at 99, 78 S.Ct., at 597. Death, however, was distinguished on the ground that it was "still widely accepted." *Ibid.*

that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), yet the finality of death precludes relief. An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.' "[39]

In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. I would not hesitate to hold, on that ground alone, that death is today a "cruel and unusual" punishment, were it not that death is a punishment of long-standing usage and acceptance in this country. I therefore turn to the second principle—that the State may not arbitrarily inflict an unusually severe punishment.

The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime.

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960–1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963–1964.[40] Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline. That rarity is plainly revealed by an examination of the years 1961–1970, the last 10-year period for which statistics are available. During that time, an average of 106 death sentences was imposed each year.[41] Not nearly that number, however, could be carried out, for many were precluded by commutations to life or a term of years,[42] transfers to mental institutions because of insanity,[43] resentences to life or a term of years, grants of new trials and orders for resentencing, dismissals of indictments and reversals of convictions, and deaths by suicide and natural causes.[44]

39. Stephen, Capital Punishments, 69 Fraser's Magazine 753, 763 (1864).

40. From 1930 to 1939: 155, 153, 140, 160, 168, 199, 195, 147, 190, 160. From 1940 to 1949: 124, 123, 147, 131, 120, 117, 131, 153, 119, 119. From 1950 to 1959: 82, 105, 83, 62, 81, 78, 65, 65, 49, 49. From 1960 to 1967: 56, 42, 47, 21, 15, 7, 1, 2. Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930–1970, p. 8 (Aug. 1971). The last executions in the United States took place on June 2, 1967. *Id.*, at 4.

41. 1961—140; 1962—103; 1963—83; 1964—106; 1965—56; 1966—115; 1967—85; 1968—102; 1969—97; 1970—127. *Id.*, at 9.

42. Commutations averaged about 18 per year. 1961—17; 1962—27; 1963—14; 1964—9; 1965—19; 1966—17; 1967—13; 1968—16; 1969—20; 1970—29. *Ibid.*

43. Transfers to mental institutions averaged about three per year. 1961—3; 1962—4; 1963—1; 1964—3; 1965—4; 1966—3; 1967—3; 1968—2; 1969—1; 1970—8. *Ibid.*

44. These four methods of disposition averaged about 44 per year. 1961—31; 1962—30; 1963—22; 1964—34; 1965—39; 1966—33; 1967—53; 1968—39; 1969—64; 1970—42. *Ibid.* Specific figures are available starting with 1967. Resentences: 1967—7; 1968—13; 1969—12; 1970—14. Grants of new trials and orders for resentencing: 1967—31; 1968—21; 1969—13; 1970—9. Dismissals of

On January 1, 1961, the death row population was 219; on December 31, 1970, it was 608; during that span, there were 135 executions.[45] Consequently, had the 389 additions to death row also been executed the annual average would have been 52.[46] In short, the country might, at most, have executed one criminal each week. In fact, of course, far fewer were executed. **Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two.[47]**

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.

Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. However the rate of infliction is characterized—as "freakishly" or "spectacularly" rare, or simply as rare—it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be?

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: Death is inflicted, they say, only in "extreme" cases.

Informed selectivity, of course, is a value not to be denigrated. Yet presumably the States could make precisely the same claim if there were 10 executions per year, or five, or even if there were but one. That there may be as many as 50 per year does not strengthen the claim. When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily "extreme." Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrates the "extreme," then nearly all murderers and their murders are also "extreme."[48]

Furthermore, our procedures in death cases, rather than resulting in the selection of "extreme" cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. McGautha v. California, 402 U.S. 183, 196–208, 91 S.Ct. 1454, 1461–1468, 28 L.Ed.2d 711 (1971). In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.

Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother STEWART puts it "wantonly and . . . freakishly" inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

When there is a strong probability that an unusually severe and degrading punishment is being inflicted arbitrarily, we may well expect that society will disapprove of its infliction. I turn, therefore, to the third principle. An examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society.

I cannot add to my Brother MARSHALL's comprehensive treatment of the English and American history of this punishment. I emphasize, however, one significant conclusion that emerges from that history. From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, "the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement

Indictments and reversals of convictions: 1965—12; 1966—19; 1967—33; 1970—17. Deaths by suicide and natural causes: 1967—2; 1968—1; 1969—5; 1970—2. National Prisoner Statistics No. 42, Executions 1930–1967, p. 13 (June 1969); National Prisoner Statistics No. 43, Capital Punishment 1930–1968, p. 12 (Aug. 1969); National Prisoner Statistics, *supra*, n. 40, at 14–15.

45. *Id.*, at 9.

46. During that 10-year period, 1,177 prisoners entered death row, including 139 who were returned following new trials or treatment at mental institutions. There were 653 dispositions other than by execution, leaving 524 prisoners who might have been executed of whom 135 actually were. *Ibid.*

47. *Id.*, at 3.

48. The victim surprised Furman in the act of burglarizing the victim's home in the middle of the night. While escaping, Furman killed the victim with one pistol shot fired through the closed kitchen door from the outside. At the trial, Furman gave his version of the killing:

"They got me charged with murder and I admit, I admit going to these folks' home and they did caught me in there and I was coming back out, backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all to it." App. 54–55.

The Georgia Supreme Court accepted that version:

"The admission in open court by the accused . . . that during the period in which he was involved in the commision of a criminal act at the home of the deceased, he accidentally tripped over a wire in leaving the premises causing the gun to go off, together with other facts and circumstances surrounding the death of the deceased by violent means, was sufficient to support the verdict of guilty of murder . . . ." Furman v. State, 225 Ga. 253, 254, 167 S.E.2d 628, 629 (1969).

About Furman himself, the jury knew only that he was black and that, according to his statement at trial, he was 26 years old and worked at "Superior Upholstery." App. 54. It took the jury one hour and 25 minutes to return a verdict of guilt and a sentence of death. *Id.*, at 64–65.

APPENDIX "K"

Huson v. Farmer, 53 Ga. App. 131, 185 S.E. 119 (1936) (decided under former Code 1933, § 6-901).

Specificity necessary in enumeration regarding admission of allegedly prejudicial evidence. — Enumeration of error upon admission of evidence complaining that same creates false and prejudicial issue, in order to be complete, must set out how evidence was prejudicial and what false issue was created. Essig v. Cheves, 75 Ga. App. 870, 44 S.E.2d 712 (1947) (decided under former Code 1933, § 6-1607).

Complaint that illegal rulings were made without setting out nature of rulings, is insufficient as an assignment of error. Harbour v. Rittenbaum, 101 Ga. App. 878, 115 S.E.2d 573 (1960) (decided under former Code 1933, § 6-901).

General exception to entire charge is too broad where whole charge is not erroneous. Cheek v. State, 22 Ga. App. 788, 97 S.E. 203 (1918) (decided under former Penal Code 1910, § 1097).

Assignment of error based on statement of fact which is denied in answer cannot be considered. Jones v. City of Rome, 15 Ga. App. 41, 82 S.E. 593 (1914) (decided under former Penal Code 1910, § 1097).

RESEARCH REFERENCES

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C.J.S. — 4A C.J.S., Appeal and Error, §§ 707, 708, 785-801.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 ALR 725.

5-6-41. Reporting, preparation, and disposition of transcript of evidence and proceedings generally; procedure as to correction of omissions or misstatements; preparation of transcript from recollection of parties and trial judge; filing of disallowed pleadings, etc.; filing of stipulation of parties as to facts, etc., of case in lieu of transcript; reporting of case at party's expense.

(a) In all felony cases, the transcript of evidence and proceedings shall be reported and prepared as provided in Code Section 17-8-5 or as otherwise provided by law.

(b) In all misdemeanor cases, the trial judge may, in his discretion, require the reporting and transcribing of the evidence and proceedings on terms prescribed by him.

(c) In all civil cases tried in the superior and city courts and in any other court, the judgments of which are subject to review by the Supreme Court or the Court of Appeals, the trial judge thereof may require the parties to have the proceedings and evidence reported, the costs thereof to be borne equally between them; and, where an appeal is taken which draws in question the transcript of the evidence and proceedings, it shall be the duty of the appellant to have the transcript prepared at his expense. Where it is determined that the parties, or either of them, are financially unable to pay the costs of reporting or transcribing, the judge may, in his discretion, authorize trial of the case unreported; and, when it becomes necessary for a transcript of the evidence and proceedings to be prepared, it shall be the duty of the moving party to prepare the transcript from recollection or otherwise.

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(d) Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, evidence (whether admitted or stricken on objection or otherwise), copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called in question on appeal or other posttrial procedure shall be reported; and, where the report is transcribed, all such matters shall be included in the written transcript, it being the intention of this article that all these matters appear in the record. Where matters occur which were not reported, such as objections to oral argument, misconduct of the jury, or other like instances, the court, upon motion of either party, shall require that a transcript of these matters be made and included as a part of the record. The transcript of proceedings shall not be reduced to narrative form unless by agreement of counsel; but, where the trial is not reported or the transcript of the proceedings for any other reason is not available and the evidence is prepared from recollection, it may be prepared in narrative form.

(e) Where a civil or criminal trial is reported by a court reporter and the evidence and proceedings are transcribed, the reporter shall complete the transcript and file the original and one copy thereof with the clerk of the trial court, together with his certificate attesting to the correctness thereof. In criminal cases where the accused was convicted of a capital felony, an additional copy shall be filed for the Attorney General, for which the court reporter shall receive compensation from the Department of Law as provided by law. The original transcript shall be transmitted to the appellate court as a part of the record on appeal; and one copy will be retained in the trial court, both as referred to in Code Section 5-6-43. Upon filing by the reporter, the transcript shall become a part of the record in the case and need not be approved by the trial judge.

(f) Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the trial court shall set the matter down for a hearing with notice to both parties and resolve the difference so as to make the record conform to the truth. If anything material to either party is omitted from the record on appeal or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected and, if necessary, that a supplemental record shall be certified and transmitted by the clerk of the trial court. The trial court or the appellate court may at any time order the clerk of the trial court to send up any original papers or exhibits in the case, to be returned after final disposition of the appeal.

(g) Where a trial is not reported as referred to in subsections (b) and (c) of this Code section or where for any other reason the transcript of the proceedings is not obtainable and a transcript of evidence and proceedings is prepared from recollection, the agreement of the parties thereto or their counsel, entered thereon, shall entitle such transcript to be filed as a part of the record in the same manner and with the same binding effect as a transcript filed by the court reporter as referred to in subsection (e) of this Code section. In case of the inability of the parties to agree as to the correctness of such transcript, the decision of the trial judge thereon shall be final and not subject to review; and, if the trial judge is unable to recall what transpired, he shall enter an order stating that fact.

(h) Where any amendment or other pleading or paper which requires approval or sanction of the court in any proceeding before being filed of record is disallowed or sanction thereof is refused, the amendment, pleading, or paper may nevertheless be filed (with notation of disallowance thereon) and shall become part of the record for purposes of consideration on appeal or other procedure for review.

(i) In lieu of sending up a transcript of record, the parties may by agreement file a stipulation of the case showing how the questions arose and were decided in the trial court, together with a sufficient statement of facts to enable the appellate court to pass upon the questions presented therein. Before being transmitted to the appellate court, the stipulation shall be approved by the trial judge or the presiding judge of the court where the case is pending.

(j) In all cases, civil or criminal, any party may as a matter of right have the case reported at his own expense. (Ga. L. 1965, p. 18, § 10.)

Cross references. — As to powers and duties of Judicial Council with regard to reporting of judicial proceedings, see § 15-5-20 et seq. As to court reporters generally, see Ch. 14, T. 15.

JUDICIAL DECISIONS

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General Consideration
Constitutionality
Judicial Discretion
Felony Cases
Misdemeanor Cases
Reporting of Voir Dire
Content of Transcript
Incorrect or Incomplete Transcripts
Stipulated Transcripts

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ARTICLE 2

DEATH PENALTY GENERALLY

Cross references. — Constitutional guarantee against deprivation of life without due process, Ga. Const. 1983, Art. I, Sec. I, Para. I.

U.S. Code. — Death penalty, Federal Rules of Criminal Procedure, Rule 38.

17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it

involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3.)

Cross references. — Time limitation on prosecutions for crimes punishable by death, § 17-3-1. Presentence hearings in death penalty cases, § 17-10-2.

Law reviews. — For article opposing capital punishment in Georgia, see 15 Ga. St. B.J. 159 (1979). For article supporting capital punishment in Georgia, see 16 Ga. St. B.J. 48 (1979). For article surveying Georgia cases in the area of evidence from June 1979 through May 1980, see 32 Mercer L. Rev. 63 (1980). For article, "Constitutional Criminal Litigation," see 32 Mercer L. Rev. 993 (1981). For article, "Executing Those Who Kill Blacks: An Unusual Case Study," see 37 Mercer L. Rev. 911 (1986). For survey of 1985 Eleventh Circuit cases on constitutional criminal procedure, see 37 Mercer L. Rev. 1275 (1986). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

For note discussing statutory aggravating circumstances and the death penalty, see 35 Mercer L. Rev. 1443 (1984). For note "McCleskey v. Kemp: An Equal Protection Challenge to Capital Punishment," see 39 Mercer L. Rev. 675 (1988).

For comment analyzing and criticizing the 1973 capital punishment statute in light of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment on Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979). For case comment, "Booth v. Maryland: Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials," see 21 Ga. L. Rev. 1191 (1987).

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execution of the original sentence, but the Department of Offender Rehabilitation (now Corrections) is not bound by further, more specific time limitations which such court might impose and the department may exercise broad discretion in establishing the specific hour of execution on the date specified. 1980 Op. Att'y Gen. No. 80-86.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 595-598.
C.J.S. — 24 C.J.S., Criminal Law, §§ 1591, 1592.

ALR. — Effect of permitting day fixed for execution to pass without carrying out sentence, 34 ALR 314.

17-10-35. Review of death sentences by Supreme Court; forwarding of record and transcript by clerk of trial court; scope of review; written briefs and oral argument; similar cases to be included in decision; direct appeal to be consolidated with sentence review.

(a) Whenever the death penalty is imposed, upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court.

(b) The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section 17-10-30; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the state shall have the right to submit briefs within the time provided by the court and to present oral argument to the court.

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(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court in its decision and the extracts prepared as provided for in subsection (a) of Code Section 17-10-37 shall be provided to the resentencing judge for his consideration.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence. (Code 1933, § 27-2537, enacted by Ga. L. 1973, p. 159, § 4.)

Cross references. — Employment of law clerks to assist superior courts in handling appeals by individuals awaiting execution, § 15-6-28.1.

Law reviews. — For article, "Toward a Perspective on the Death Penalty Cases," see 27 Emory L.J. 469 (1978); For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For article, "The Georgia Bill of Rights: Dead or Alive?," see 34 Emory L.J. 341 (1985).

For comment analyzing and criticizing the 1973 capital punishment statute in light of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 891 (1973). For comment criticizing inadequate standards and nebulous measurements for review under Georgia death penalty statute, in light of Colby v. State, 231 Ga. 829, 204 S.E.2d 612 (1974), see 26 Mercer L. Rev. 331 (1974).

JUDICIAL DECISIONS

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General Consideration
Factors Reviewed by Court
1. Passion, Prejudice, or Other Arbitrary Factor
2. Aggravating Circumstances
3. Excessive or Disproportionate Sentences

General Consideration

Constitutionality. — Section is not unconstitutional. Young v. State, 237 Ga. 852, 230 S.E.2d 287 (1976), cert. denied, 476 U.S. 1123, 106 S. Ct. 1991, 90 L. Ed. 2d 672 (1986).

Section is not subject to constitutional attack under U.S. Const., Amends. 8 and 14. Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

As to constitutionality, see House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), cert. denied, 428 U.S. 910, 96 S. Ct. 3221, 49 L. Ed. 2d 1217 (1976); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974), cert. denied, 431 U.S. 949, 97 S. Ct. 2667, 53 L. Ed. 2d 266 (1977); Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S. Ct. 508, 50 L. Ed. 2d 599 (1976).

Supreme Court, U.S.
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NO. 92-5579

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RECEIVED
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SUPREME COURT, U.S.

WILBURN DOBBS,

Petitioner,

v.

WALTER D. ZANT,
WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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Counsel of Record
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SUPREME COURT, U.S.

QUESTIONS PRESENTED

I.

Did the Eleventh Circuit Court of Appeals properly conclude that Petitioner had failed to show that there was a constitutionally unacceptable level of risk that racial prejudice influenced the sentencing decision?

II.

Did the Eleventh Circuit Court of Appeals and the District Court properly decline to include a transcript when there has been no hearing to determine why the transcript was not included in the lower courts and why Petitioner failed to take the action that he took to discover the transcript at an earlier date?

III.

Did the Eleventh Circuit Court of Appeals properly decline to reconsider an allegation of ineffective assistance of counsel based upon the law of the case?

IV.

Is Petitioner's allegation relating to the sentencing phase instructions barred by the law of the case doctrine, or in the alternative, did the instructions properly inform the jury that they had discretion in determining punishment once an aggravating factor was found?

V.

Should this Court decline to consider an issue not raised below, that is, whether the court should review the issue of whether jurors must consider mitigating circumstances or whether it is sufficient that they not be prohibited from considering mitigating circumstances?

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NO. 92-5579

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILBURN DOBBS,

Petitioner,

v.

WALTER D. ZANT,
WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF
OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Wilburn Dobbs, was tried beginning on May 20, 1974, in the Superior Court of Walker County, Georgia, on two counts of aggravated assault, two counts of armed robbery and one count of murder. All of these charges arose out of one incident at a convenience store in December, 1973. On May 22, 1974, Petitioner was found guilty on all five counts.

Petitioner received a ten year consecutive sentence for each of the aggravated assault convictions, life imprisonment for each of the armed robbery convictions and was sentenced to the death penalty for the murder conviction.

Petitioner appealed the convictions and sentences to the Supreme Court of Georgia. That court affirmed the convictions and sentences. Dobbs v. State, 236 Ga. 427, 224 S.E.2d 3 (1976). The Supreme Court of the United States subsequently denied a petition for a writ of certiorari. Dobbs v. Georgia, 430 U.S. 975 (1977).

Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia, on July 17, 1977. After an evidentiary hearing was held, the petition was denied on October 9, 1979. An application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on February 20, 1980.

A petition for a writ of certiorari was denied by the Supreme Court of the United States on June 16, 1980, and a subsequent petition for rehearing was denied on August 11, 1980.

During the time that the case had been pending in the state habeas corpus court, Petitioner filed an extraordinary motion for a new trial in the Superior Court of Walker County on June 11, 1979. An evidentiary hearing was conducted on August 12, 1979. The motion was denied by the Superior Court on August

13, 1979. The Supreme Court of Georgia affirmed the denial of the extraordinary motion for new trial. Dobbs v. State, 245 Ga. 208, 264 S.E.2d 18 (1980). A petition for a writ of certiorari was denied by the Supreme Court of the United States on April 21, 1980.

Petitioner filed the instant petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, Rome Division, on December 3, 1980. An evidentiary hearing was held before the Magistrate on October 6, 1982. Both parties filed objections to various portions of that report and recommendation. On January 13, 1984, the district court entered an order denying habeas corpus relief as to the convictions but granting relief as to the death sentence. The district court did not rule on certain sentencing issues. Petitioner and Respondent both appealed.

The Eleventh Circuit Court of Appeals affirmed the district court as to the conviction but reversed the district court's decision on sentence, ruled the issue was without merit and remanded for consideration of the remaining issues. Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986). A second opinion was issued on rehearing in Dobbs v. Kemp, 809 F.2d 750 (11th Cir. 1987), elaborating on two issues.

Petitioner then filed a petition for a writ of certiorari which was denied on May 18, 1987. Rehearing was denied on June 22, 1987. Dobbs v. Kemp, 481 U.S. 1059 (1987).

The parties proceeded to take depositions including the eleven surviving trial jurors, the trial judge and trial counsel, as well as Petitioner's expert. On August 7, 1989, the district court denied relief on all of the issues which were the basis of the remand. Dobbs v. Zant, 790 F.Supp. 1566 (N.D. Ga. 1989).

On August 21, 1989, the Petitioner filed a motion to alter, amend and reconsider the judgment or, in the alternative, for relief from judgment. Petitioner subsequently obtained an order for additional time to file a supplement to that motion. On September 7, 1989, a conference was held with the court regarding the transcribing of the arguments of the sentencing phase. No order was entered by the court and the court declined to enter an order directing the court reporter to turn over the tapes from the trial. The court subsequently entered an order deferring ruling on the motion to alter or amend allowing Petitioner through October 12, 1989, to search for the tapes and to report back to the court.

Although not reflected in the record, the court reporter voluntarily allowed counsel to search for the stenotapes and provided full access on or about October 11, 1989. The court reporter observed that at least a portion of the sentencing phase arguments had been reported, contrary to what he had

earlier told Respondent's counsel. The court reporter agreed to transcribe the arguments that existed and completed that transcript on October 16, 1989.

After several more extensions, Petitioner finally filed "procedural" pleadings on December 4, 1989, including a motion to expand the record to include the transcripts of the sentencing phase arguments, a motion to amend the petition and a motion to reopen and reconsider certain issues decided before the original appeal to the Eleventh Circuit. A hearing was held on the procedural issues on February 2, 1990. By way of letter dated February 20, 1990, the Petitioner suggested the district court hold the proceedings in abeyance to allow Petitioner to return to the state court to exhaust an issue based on the sentencing phase argument. Petitioner has yet to pursue any such state proceeding.

Finally, on February 26, 1990, Petitioner filed the supplement to the motion to alter or amend. On March 6, 1990, the district court entered an order denying all of Petitioner's motions.

Petitioner filed a notice of appeal on April 4, 1990. The district court granted a certificate of probable cause to appeal on April 6, 1990.

The Eleventh Circuit affirmed the decision of the district court on October 25, 1991. On November 22, 1991, Petitioner

filed a petition for rehearing and suggestion of rehearing en banc. On June 4, 1992, the court issued a corrected opinion and denied rehearing.

Petitioner has now filed the instant petition seeking review of the decision of the Eleventh Circuit Court of Appeals.

PART TWO

STATEMENT OF FACTS

The facts in the instant case were set forth by the Supreme Court of Georgia on direct appeal, as follows:

> Early on the morning of December 14, 1973, appellant Wilburn Wiley Dobbs asked Walter Lee Harris and Charles Burke if they wanted to commit a robbery. Appellant said he needed money so the three of them drove in appellant's 1967 blue Chevrolet to a grocery store and gas station owned by Roy L. Sizemore. They looked around the store and left but thereafter returned to the store in different coats. Appellant told Harris to go inside the store and ask Mr. Sizemore for a gas can. While Burke stayed in front of the gas station, appellant took his sawed-off shotgun and went around to the back of the store. Mr. Sizemore went outside to show Burke where the gas can was, and when he did appellant darted inside the store.

Sixty-two-year-old Grace Foster was in the store shopping for groceries and appellant pointed the shotgun at her. When Mr. Sizemore re-entered the store, appellant covered him with the shotgun while Harris searched Mr. Sizemore and took his wallet. Mr. Sizemore told the robbers that he had heart trouble and that they could have anything they wanted but begged them not to shoot him or hurt Mrs. Foster.

Appellant shoved Mr. Sizemore to the back of the room, made him lie down and hit him two times on the back of the head with the butt of the shotgun. When Mrs. Foster tried to run to Mr. Sizemore's side, appellant pointed the shotgun at her, threatened to shoot her and told her to keep her mouth shut. Although Mrs. Foster begged appellant to spare Mr. Sizemore, Appellant turned to Mr. Sizemore, who was lying helpless

on the floor, and fired a shotgun blast into his stomach. This wound caused Mr. Sizemore's death. William Austin, a route salesman for Mayfield Dairy Farms, entered the store to make a delivery and appellant fired his shotgun at him.

While Harris was taking the money from Mr. Sizemore's cash register, appellant hit Mrs. Foster in the back of the head with the butt of his shotgun and knocked her unconscious. Appellant, or one of his companions, then placed his foot on Mrs. Foster's hand and tore her pocketbook out of her grasp. Mrs. Foster had a skull fracture above the eye, a brain concussion, cuts on her forehead and scalp, bruises, and scratches as a result of this beating. Her eyelids were swollen, both of her eyes were black and ten stitches were required to close one of her cuts.

> After appellant and his companions left the store with $210 taken by them, Mr. Austin (the route salesman) went to Mr. Sizemore and tried to find a pulse but Mr. Sizemore was dead at that time from the shotgun blast.

Dobbs v. State, 236 Ga. 427-8.

The record additionally shows that Petitioner testified at trial and stated that he was not with Harris and Burke when the robbery was committed. He asserted that he was visiting with various people on December 14, 1973. Petitioner did admit going to Paul Young's car lot. Petitioner was approached by certain officers at that time and voluntarily accompanied the officers to Walker County jail. Petitioner also gave the officers permission to search his car. A brown tobacco sack and a pocket knife were found in the car, which were identified by Grace Foster at trial as having been taken from her at Sizemore's store. Petitioner was arrested finally on December 18, 1973. Petitioner also gave a detective permission to get the shotgun used in the robbery from his home during part of the questioning. Furthermore, Grace Foster and William Austin positively identified the Petitioner at trial as the triggerman at the store.

Further facts will be developed as necessary to examine the issues presented by the instant petition.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THERE IS NO BASIS FOR THIS COURT'S GRANTING OF CERTIORARI AS THE ELEVENTH CIRCUIT COURT OF APPEALS APPLIED THE APPROPRIATE EIGHTH AMENDMENT TEST IN CONCLUDING THAT PETITIONER HAD NOT DEMONSTRATED A CONSTITUTIONALLY UNACCEPTABLE RISK THAT RACIAL PREJUDICE AFFECTED HIS SENTENCING.

Petitioner first asserts that this Court should grant the instant petition for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals regarding his allegation of racial prejudice at his sentencing. In the district court and in the Eleventh Circuit Court of Appeals Petitioner raised both Fourteenth Amendment equal protection and Eighth Amendment cruel and unusual punishment claims. In this Court, Petitioner relies solely on the Eighth Amendment allegation. The basis for Petitioner's assertion that certiorari should be granted is his conclusion that the Eleventh Circuit Court of Appeals improperly held that the Petitioner was required to prove that racial prejudice actually affected the decision of the jurors. Respondent submits that

the Eleventh Circuit Court of Appeals properly applied the correct Eighth Amendment standard in reviewing Petitioner's allegations.

Respondent would initially note that the primary basis for Petitioner's offer of proof in the district court consisted of the depositions of the trial jurors and the testimony of an individual purporting to be an expert basing his opinions upon those depositions. Respondent has at all times opposed the taking of the depositions of the trial jurors and would continue to oppose the utilization of those depositions under Rule 606 of the Federal Rules of Evidence.

In the Eleventh Circuit, Petitioner acknowledged "the record may not prove that the decision makers acted with bad purpose." (Petitioner's Brief at 10 n. 4). The most Petitioner has ever asserted is that based on the background of the jurors, racial attitudes might have had some effect on their decisions. Each juror specifically denied that race had any effect on the outcome of this case, but insisted that the outcome was based solely on the heinous nature of the crime committed and the Petitioner's demeanor.

In McCleskey v. Kemp, 481 U.S. 279 (1987), the Court addressed the Eighth Amendment challenge based on alleged racial discrimination. Although the Court in McCleskey was dealing solely with a statistical challenge to the death penalty, its analysis in the Eighth Amendment context is

relevant here. The Court noted in that case that no one contended that the studies presented could prove that race entered into a capital sentencing decision or that race actually was a factor in the particular case. The Court acknowledged, "there is, of course, some risk of racial prejudice influencing a jury's decision in a criminal case. There are similar risks that other kinds of prejudice will influence other criminal trials." Id. at 309. The Court went on to hold, "where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious." Id. at 313.

Petitioner specifically challenges the decision of the district court and circuit court and the standard utilized by those courts. Petitioner cites to the decision of this Court in Turner v. Murray, 476 U.S. 28 (1986). The plurality opinion in that case did discuss the question of whether certain factors would create an unacceptable risk that the death penalty may have been imposed arbitrarily or capriciously. The plurality also found, however, that the risk in that case was unacceptable "in light of the ease with which that risk could have been minimized." Id. at 36. The Court was focusing on the question of whether the trial judge should have been required to allow questions during voir dire about racial attitudes of the jurors. Under the circumstances of that particular case, and the fact that the case involved the death

penalty, the Court concluded that the defense was entitled to ask the questions. Although the language in Turner might be of assistance in the instant case, the legal situations are entirely different as what is being considered here is not a prophylactic rule but the ultimate decision of the trial jury. Therefore, the lower court's reliance on the decision in McCleskey was appropriate.

Furthermore, the district court fully examined all factors in deciding this issue. In fact, in the order of March 6, 1990, subsequent to Petitioner's motion to alter or amend or reopen and motion for reconsideration, the Court specifically examined Petitioner's assertion that the Court failed to apply the appropriate standard and held, "Dobbs must show an unacceptable risk that race may have affected the sentencing decision." (R9-135-8) The Court went on to conclude that the question was a subjective one of "whether the particular decision makers in his case harbored prejudices that created an unacceptable
risk. . . ." (R9-135-9).

Similarly, the Eleventh Circuit held that to prove in this case "that the risk of racial prejudice influencing sentencing rose to constitutionally unacceptable levels, Dobbs must show that racial prejudice actually affected the jury's decision." The court went on to hold that Petitioner "has failed to demonstrate that a constitutionally unacceptable risk existed that racial prejudice affected his sentencing." Dobbs v. Zant.

Respondent submits the lower court properly applied a subjective standard. Although the district court did find that certain jurors had racial prejudices, the district court did not find that those prejudices had an impact on the death sentence in Petitioner's case and in fact found that the risk of such did not rise to a constitutional level. The district court specifically found as a matter of fact that Petitioner had failed to show that any racial prejudice influenced the jury's verdict.

In reviewing Petitioner's allegations, it is important to note that Petitioner focuses on brief excerpts from the depositions of the eleven trial jurors that were surviving at the time of the remand, ten of whom were white and one black. Petitioner fails to focus on extensive other testimony provided in these depositions which was cited by the district court and which is pertinent to the district court's resolution of the issue presented. Although it is undisputed that the population in Walker County, Georgia, consisted of only approximately four percent blacks and that the Petitioner is black and the victim was white, this alone in the context of this case did not create a constitutionally unacceptable risk that race would be a factor in the sentencing decision of the jury. Again, Petitioner's reliance on Turner v. Murray is misplaced as that was dealing with a prophylactic requirement upon the trial court and not with the final sentencing decision of the jury.

What can be seen from the depositions of the white trial jurors is that their backgrounds were consistent with the backgrounds of most people growing up during this particular time frame in that they all went to segregated schools and segregated churches and as a general rule most did not socialize with black people while they were growing up. To draw any kind of inference of racial discrimination or prejudice particularly of a constitutionally significant magnitude from this type of background would be to eliminate the overwhelming majority of the population of the state as eligible jurors, judges, defense attorneys, or district attorneys in all cases in which a black defendant and a white victim are involved.

Although many jurors testified that they did not socialize with blacks, a review of the entire deposition will show that most of these jurors did not socialize either inside or outside the home except on rare occasions. They all grew up in small communities with not much opportunity to socialize. Although several jurors expressed concerns about family members marrying blacks, several jurors stated that they did not have particular concerns or that their concerns were based on concerns for the children of such a marriage. Every juror disagreed with the principles of hatred espoused by the Klan and most jurors did not even know anyone who had been a member of the Klan.

Several jurors had worked with blacks over the years. As noted by the district court, "none of the jurors viewed blacks as more violence prone than whites, or as morally inferior to whites." Dobbs, 720 F.Supp. at 1576. Only two jurors expressed a fear of blacks. "To varying degrees, all the jurors said that their opinion of a black person depends on the qualities of the individual and/or that skin color does not determine those qualities." Id. Mr. Marsh, the one black juror, did not even voice particular concerns about discrimination over the years nor about discrimination in this case.

As observed by the Eleventh Circuit, "although certain of the juror's statements revealed racial prejudice, no juror stated that he or she viewed blacks as more prone to violence than white, or as morally inferior to whites and their comments do not reveal otherwise."

Respondent submits that what can be seen from these depositions is simply that these jurors had much in common with many people in Georgia during the time frame in which they grew up. The fact that they may have grown up with a particular environment or have some generalized attitudes does not support any inference as to the basis for their opinion in this particular case. In fact, all jurors who were asked stated that race had absolutely no effect on their decision as to the death sentence and that the facts of the case were what

justified the death sentence. Under these circumstances, Respondent submits that the Petitioner has simply not established an Eighth Amendment violation.

Petitioner also focuses on the depositions of the trial attorney and the trial judge and attempts to assert that their attitudes somehow rendered the sentence in this case an Eighth Amendment violation. Respondent submits that the attitudes of the trial attorney and the trial judge are not relevant to a consideration of the basis for the decisionmakers' imposing a death sentence. The judge, as did the jurors and the remainder of the people in Walker County who grew up in the same time period, grew up in a segregated community with limited contact with black people. Petitioner also attempts to make much of the trial judge's votes in the General Assembly years prior to his serving as a judge in this case which certainly are not relevant to his attitude at the time of the trial in this case. Furthermore, Petitioner would characterize virtually every member of the General Assembly who served during the same time as did Judge Coker as a racist or at least one operating with an overpowering racial prejudice, rather than recognizing that the time Judge Coker served in the General Assembly was almost twenty years prior to the trial of the instant case. Even if it could be said that the votes of Judge Coker during the time he was in the General Assembly reflected his personal attitudes during that time frame, it certainly cannot be said

that they in any way reflect his attitudes twenty years later. Petitioner has shown no conduct on the part of Judge Coker either prior to or during the trial of this case which indicated any bias against the Petitioner or any bias against blacks, certainly not any which would have affected the way he handled the trial of this case or would have affected the outcome of this case in any fashion. Respondent submits that Petitioner simply has failed to establish a basis for an Eighth Amendment violation or any showing that there was any risk that Judge Coker's views on race had any effect on the sentence.

Petitioner's assertions concerning trial counsel also do not serve as a basis for an Eighth Amendment violation. As noted by the district court, this would be a challenge to the effectiveness of trial counsel, not an Eighth Amendment claim. Such a Sixth Amendment claim is, of course, unexhausted. Petitioner has not asserted anything specific that counsel could have or should have done that would have actually affected the outcome of the proceeding. Petitioner has yet to show any racial bias on the part of any of the jurors which would have resulted in their disqualification prior to trial nor has he established any actual racial prejudice that impacted on this case that counsel could have eliminated. Further, as noted by the Eleventh Circuit, "Dobbs' lawyer did not express his personal views at Dobbs' trial and neither the

lawyer nor the trial judge decided Dobbs' penalty. . . .[i]t cannot be said that the trial judge's or the defense lawyer's racial attitudes affected the juror's sentencing determination." Dobbs v. Zant.

Respondent submits that a review of all of the above clearly establishes that Petitioner failed to carry his burden of proving an Eighth Amendment violation based on the death sentence in this case. Further, the lower courts applied the correct legal analysis. Certainly, there is always a possibility that racial prejudice might have an influence in any given case, but the mere possibility is insufficient to establish a constitutional violation. All Petitioner has done is to make gross generalizations from the statements made by trial jurors to attempt to convince this Court to make some overriding inference of discrimination by the imposition of the death sentence in this case or a conclusion of an unacceptable risk that racial prejudice affected the sentence.

Thus, there is no basis for this Court's granting certiorari on this issue.

II. THE DISTRICT COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY DECLINED TO EXPAND THE RECORD TO INCLUDE A TRANSCRIPT OF THE SENTENCING PHASE ARGUMENTS AND PROPERLY DECLINED TO RECONSIDER THE ALLEGATION OF INEFFECTIVE ASSISTANCE AT SENTENCING BASED UPON THE LAW OF THE CASE DOCTRINE.

Petitioner next asserts that the district court and the Eleventh Circuit Court of Appeals erred in refusing to expand the record to include the transcript of the sentencing phase arguments. It should be noted that Petitioner consistently refers to this transcript as a transcript of the entire sentencing phase. Actually, this is incorrect. There was no evidentiary presentation at the sentencing phase; however, the court's initial charge to the jury, the tendering of any documents and the court's concluding charge to the jury were submitted and were before the Eleventh Circuit Court of Appeals in its first review. The only additional portion of the transcript that was obtained pertaining to the sentencing phase consists of the closing arguments of the defense and the state consisting of a total of twelve pages.

As set forth in the initial procedural history, this transcript was a subject of litigation in the district court after final judgment was entered. Contrary to all of Petitioner's assertions, there has never been any finding of bad faith, misconduct or intentional misleading on the part of any party nor has there ever been any finding by any court which would justify Petitioner's accusations of affirmative misleading by the Respondent. (Petition at p. 34). All that the record reveals is that Respondent submitted an affidavit from the court reporter over ten years ago indicating that the court reporter stated he had not transcribed the sentencing phase arguments and an affidavit from the trial judge indicating that he did not believe that the closing arguments at the sentencing phase were transcribed. Contrary to Petitioner's assertions, there was no court order from the district court that in any way related to Petitioner's obtaining these transcripts or conducting any search of the court reporter's office. Rather, the district court specifically told the Petitioner that no such order would be entered and Petitioner was told to inquire of the court reporter. Upon request, the court reporter voluntarily agreed to allow counsel for Petitioner to conduct their own search of the stenotapes in storage. All of this, obviously, is not a matter of record as there has never been any evidentiary development on the obtaining of the transcript or the failure

to have obtained the transcript, nor has there ever been any reason offered by the Petitioner as to why he decided to make this inquiry at the late stage of the proceedings that he did and why he could not have made the same inquiry earlier. The whole point of Respondent's opposition to Petitioner's motion to expand the record in the district court was that there necessarily needed to be evidentiary development on this question and that the state habeas corpus court had not had the opportunity to review this particular transcript in making its assessment. The district court thus properly declined to allow the record to be expanded to consider a transcript which had not have been presented to the state appellate or state habeas corpus court for review.

Petitioner again sought to expand the record and asked the Eleventh Circuit Court of Appeals to remand the case to require the transcript to be submitted. The Eleventh Circuit Court of Appeals declined to do so. In spite of that ruling, and contrary to the rules of the Eleventh Circuit Court of Appeals, Petitioner then simply attached the transcript to his record excerpts to that case, as he has attached that transcript as an appendix to this Court. That transcript is not a part of the record and has never been made a part of the record by any court and the contents of that transcript are not properly before this Court for its consideration.

All the district court and the Eleventh Circuit Court of Appeals have done is require the Petitioner to present this evidence to the state courts first. Petitioner's argument that this is not in keeping with the court's concerns of finality are misplaced and are particularly ironic when Petitioner is seeking to have this Court relitigate issues previously decided prior to the Eleventh Circuit Court of Appeals' remand. In fact, the decision by this Court in Keeney v. Tamyo-Reyes, ___ U.S.___ , 112 S.Ct. 1715 (1992), supports Respondent's position. In that case, this Court held that a Petitioner must show cause and prejudice before he would be allowed to present evidence to the federal courts which was not presented to the state courts. Petitioner has never made such a showing and there has never been any finding by any court on this particular issue. It would be particularly inappropriate for an appellate court to try to make some assessment based upon the bare allegations of the Petitioner and the limited amount of evidence in this record as to the appropriateness of considering this transcript and particularly to try to resolve any allegations of bad faith or improper conduct on the part of the Respondent.

Additionally, Petitoiner has consistently referred to matters which have not been proven and are not a matter of evidence in any court including Petitioner's assertions that he has constantly sought the trial transcript. This is a matter which was not developed in any evidentiary fashion in the

district court and the most the record reflects is that in 1981 Petitioner asked that the record be supplemented with the closing argument of the district attorney at the sentencing phase. To the best Respondent can determine, Petitioner's motion to expand the record originally filed in the district court did not refer to the argument of trial counsel. The record does not reflect the Petitioner did anything after 1981 to attempt to either reconstruct the transcript which is allowable under the provisions of Georgia law or to simply examine the court reporter's notes as he did in the instant case, until after the district court denied relief in its entirety in 1989.

The most that the record shows is that for some reason after final judgment was entered by the district court, Petitoiner embarked on a fishing expedition to try to have the district court reconsider its judgment. Petitioner had numerous opportunities throughout the years to utilize an available state procedure to attempt to reconstruct this portion of the transcript, see, O.C.G.A. § 5-6-41, and certainly could have attempted to do so at the time when the memories of all parties were fresh, prior to the time that the district attorney who tried the case died and could have sought information from all those present.

Petitioner also asserts that exhaustion is not an issue in relation to this transcript. Petitioner does not mention to this Court that Petitioner sought to raise in the district court a substantive issue challenging the prosecutor's closing argument at the sentencing phase which he does not raise here. The district court specifically ruled that that issue would be unexhausted and that to allow the document in support of that issue would render the petition a mixed petition under Rose v. Lundy, 455 U.S. 209 (1989). The district court then went on to conclude that Petitioner should present any allegations based on the closing arguments at the sentencing phase in the state court first and that would allow the state court to make a factual inquiry to determine the process by which the trial was transcribed. Petitioner has yet to seek to file a state habeas corpus petition attempting to exhaust any allegation relating to the prosecutor's closing argument and he has not sought to present a state petition including the transcript of the sentencing phase arguments.

Petitioner has not shown that the district court abused its discretion in declining to reopen the record after final judgment was rendered and has not shown any abuse of discretion on the Eleventh Circuit Court of Appeals in declining to expand the record. Therefore, there was no issue for the Eleventh Circuit Court of Appeals or the district court to reconsider in relation to the ineffective assistance of counsel claim and the

law of the case clearly barred review based upon the record as it existed in both courts. As noted by the Eleventh Circuit Court of Appeals, the original opinion of that court considered the allegation of ineffective assistance during the sentencing phase of the trial. Dobbs v. Zant, 790 F.2d at 1513-14. The only issue before this Court for review is the Eleventh Circuit's conclusion that it was bound by that decision under the law of the case doctrine. The substantive allegation of ineffective assistance of counsel is not before this Court for review. The most this Court should review is the question of whether the Eleventh Circuit erred in applying the law of the case doctrine. As there has been no showing of abuse of discretion in refusing to include a transcript when there has been no evidentiary development on the discovery of that transcript, there was nothing for the Eleventh Circuit Court of Appeals to reconsider in relation to the allegation of ineffective assistance of counsel and the prior decision should remain the law of the case. Therefore, this allegation presents no basis for the granting of certiorari.

III. PETITIONER'S ALLEGATION RELATING TO THE CHARGE ON MITIGATING CIRCUMSTANCES IS BARRED FROM REVIEW UNDER THE LAW OF THE CASE DOCTRINE OR WAS PROPERLY FOUND TO BE WITHOUT MERIT.

Petitioner next challenges the lower courts' conclusions that the charge on mitigating circumstances and on the discretion of the jury was constitutionally sufficient. Respondent has at all times asserted that this allegation is barred from review based upon the law of the case doctrine. Respondent also has asserted that Petitioner raised additional challenges to the sentencing phase instruction subsequent to the remand to the Eleventh Circuit Court of Appeals and any such arguments were not properly before either the district court or the Eleventh Circuit Court of Appeals.

The original panel opinion of the Eleventh Circuit Court of Appeals considered the charge on mitigating circumstances in great detail. Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986). On appeal after the remand, the Respondent submitted that the original decision was binding as the law of the case and that Petitioner has shown absolutely no basis for relitigating the allegations that had been addressed on the first appeal.

Furthermore, Respondent submitted that Petitioner's allegations also were without merit. As the Eleventh Circuit Court of Appeals applied the appropriate legal standard in reviewing these claims, there is no basis for the granting of certiorari in this case. The Eleventh Circuit Court of Appeals properly found that the charge as a whole informed the jury of its role in imposing the death penalty and "it is clear that it sufficiently informed the jury on the requirement of finding statutory aggravating circumstances and the requirement for considering mitigating circumstances. (Footnote omitted). The particular instructions to which Dobbs objects, when read in context, simply inform the jury that once it finds an aggravating factor, it has wide discretion to determine the punishment." Dobbs v. Zant.

In fact, the district court considered the charge in its entirety and noted the following:

> The judge was informing the jury that once an aggravating factor is found, the jury has wide discretion to determine the proper punishment. Given that the judge instructed the jury properly on the role of aggravating and mitigating circumstances, that Dobbs

> was not prevented from presenting anything in mitigation, and that the proceedings were bifurcated, the court rejects Dobbs' comparison of his case to the situation of Furman v. Georgia, 408 U.S. 238 (1972).

(District Court's Order on Reconsideration at 7).

Respondent submits that the district court and the Eleventh Circuit Court of Appeals properly considered the charge as a whole as required under Cupp v. Naughten, 414 U.S. 141 (1973), and found no constitutional error. To the extent Petitioner makes additional allegations, Petitioner misinterprets the charge of the court and the law of the State of Georgia as the jury in the State of Georgia does have unlimited discretion to determine whether to impose a life sentence, that is, whether they will find mercy, once a statutory aggravating circumstance has been found.

Respondent thus submits that this allegationspresents no basis for the granting of a petition for a writ of certiorari.

IV. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW AN ISSUE NOT PRESENTED TO THE COURT BELOW.

Petitioner finally asserts that this Court should grant certiorari to determine and clarify under what circumstances a jury must consider mitigating circumstances or whether the charge is sufficient if the jury is not prohibited from considering mitigating circumstances. Respondent has reviewed Petitioner's brief to the Eleventh Circuit Court of Appeals and Petitioner's reply brief and has found no allegation of this nature in either brief. Petitioner raised various allegations pertaining to the particular charge in this case and whether it adequately guided the jury's discretion and adequately explained mitigating circumstances. Petitioner at no time asked the Eleventh Circuit Court of Appeals to make the legal analysis requested of this Court.

It is well settled that certiorari will not be granted where the federal constitutional issue is raised for the first time before this Court. See, Moore v. Illinois, 408 U.S. 786, 799 (1972); Cardinale v. Louisiana, 394 U.S. 437, 438-9 (1969).

Under the circumstances of this case, Respondent submits that as the issue was not presented below, there is no basis for this Court's granting certiorari to review this claim.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, Respondent prays that this Court deny the petition for a writ of certiorari filed on behalf of Wilburn Dobbs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

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This 28th day of September, 1992.

MARY BETH WESTMORELAND
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SUPREME COURT OF THE UNITED STATES

WILBURN DOBBS *v.* WALTER D. ZANT, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92-5579. Decided January 19, 1993

PER CURIAM.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

A Georgia jury found petitioner Wilburn Dobbs guilty of murder and sentenced him to death. In his first federal habeas petition, petitioner claimed, *inter alia*, that he received ineffective assistance from his court-appointed counsel at sentencing. The District Court rejected this claim after holding an evidentiary hearing. Because a transcript of the closing arguments made at sentencing was, by the State's representation, unavailable, the District Court relied on the testimony of petitioner's counsel regarding the content of his closing argument to find that counsel had rendered effective assistance. Civ. Action No. 80-247 (ND Ga., Jan. 13, 1984), p. 24. The Court of Appeals for the Eleventh Circuit affirmed, also relying on counsel's testimony about his closing argument in mitigation. *Dobbs* v. *Kemp*, 790 F. 2d 1499, 1514, and n. 15 (1986).

Subsequently, petitioner located a transcript of the penalty phase closing arguments, which flatly contradicted the account given by counsel in key respects. Petitioner moved the Court of Appeals, now reviewing related

proceedings from the District Court, to supplement the record on appeal with the sentencing transcript. The court denied this motion without explanation. No. 90–8352 (CA11, Nov. 1, 1990).

Affirming the District Court's denial of relief on other claims, the Eleventh Circuit held that the law of the case doctrine prevented it from revisiting its prior rejection of petitioner's ineffective assistance claim. The court acknowledged the manifest injustice exception to law of the case, but refused to apply the exception, reasoning that its denial of leave to supplement the record left petitioner unable to show an injustice. 963 F. 2d 1403, 1409 (1991).

We hold that the Court of Appeals erred when it refused to consider the full sentencing transcript. We have emphasized before the importance of reviewing capital sentences on a complete record. *Gardner* v. *Florida*, 430 U. S. 349, 361 (1977) (plurality opinion). Cf. *Gregg* v. *Georgia*, 428 U. S. 153, 167, 198 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (Georgia capital sentencing provision requiring transmittal on appeal of complete transcript and record is important "safeguard against arbitrariness and caprice"). In this case, the Court of Appeals offered no justification for its decision to exclude the transcript from consideration. There can be no doubt as to the transcript's relevance, for it calls into serious question the factual predicate on which the District Court and Court of Appeals relied in deciding petitioner's ineffective assistance claim. As the Court of Appeals itself acknowledged, its refusal to review the transcript left it unable to apply the manifest injustice exception to the law of the case doctrine, and hence unable to determine whether its prior decision should be reconsidered.[1]

[1]The concurrence suggests, *post*, at 2–3, that the error in this case, limited in scope to closing arguments at the penalty phase, is likely insignificant. In fact, an inadequate or harmful closing argument, when combined, as here, with a failure to present mitigating evidence, may be highly relevant to the ineffective assistance determination under Eleventh Circuit law. See *King* v. *Strickland*, 714 F. 2d 1481, 1491 (CA11 1983), *vacated on other grounds*, 467 U. S. 1211 (1984), *adhered to on remand*, 748 F. 2d 1462, 1463–1464 (CA11 1984), cert. denied, 471 U. S. 1016 (1985); *Mathis* v. *Zant*, 704 F. Supp. 1062, 1064 (ND Ga. 1989). In any event, we see no reason to depart here from our normal practice of allowing courts more familiar with a case to conduct their own harmless error analyses.

On the facts of this case, exclusion of the transcript cannot be justified by the delay in its discovery. That delay resulted substantially from the State's own erroneous assertions that closing arguments had not been transcribed. As the District Court found: "[T]he entire transcript should have been made available for Dobbs' direct appeal, and the State represented to this Court that the sentencing phase closing arguments could not be transcribed. Dobbs' position that he legitimately relied on the State's representation is well taken." Civ. Action No. 80–247 (ND Ga., Mar. 6, 1990), p. 4.

We hold that, under the particular circumstances described above, the Court of Appeals erred by refusing to consider the sentencing hearing transcript. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari and give the case plenary consideration.

(6)

SUPREME COURT OF THE UNITED STATES

WILBURN DOBBS *v.* WALTER D. ZANT, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92-5579. Decided January 19, 1993

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

Today's judgment reverses the decision below on the grounds that, in deciding not to apply the "manifest injustice" exception to the law of the case, the Court of Appeals wrongfully failed to consider a newly discovered transcript from petitioner's trial. The judgment is correct, but the judgment is also not worth making, serving no purpose but to extend the scandalous delay in the execution of a death sentence lawfully pronounced more than 18 years ago.

As a general matter, I agree with JUSTICE STEVENS' frequently recited view that "[i]t is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law." *Anderson* v. *Harless*, 459 U. S. 4, 12 (1982) (STEVENS, J., dissenting). "'To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.'" *Board of Ed. of Rogers, Ark.* v. *McCluskey*, 458 U. S. 966, 971 (1982) (STEVENS, J., dissenting) (quoting Address of Chief Justice Vinson before the American Bar Association, September 7, 1949). I am willing to make an exception from that rule in capital cases—but only where there is a realistic likelihood that the "technical error" affected the conviction or the

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sentence. Here that is fanciful.

To begin with, the rediscovered transcript covers only the closing statements in the case, and petitioner's claim goes only to the fact that his trial counsel made one rather than two arguments in closing. It would be a rare case in which the omission of one particular argument from an attorney's closing statement would be dispositive of an ineffective assistance claim. It is simply not true, moreover, that the transcript "flatly contradict[s]," *ante*, at 1, the testimony of petitioner's trial counsel in the initial habeas hearing—or at least not true in the sense that it shows trial counsel was lying. The transcript *confirms* that, as trial counsel recalled, he had argued that the death penalty was inappropriate in any circumstance. In fact, he read to the jury large portions of Justice Brennan's opinion in *Furman* v. *Georgia*, 408 U. S. 238 (1972), which is certainly an eloquent argument that the death penalty is improper in any case. The transcript does reveal that counsel had *not* argued in mitigation that the killing was impulsive—which, petitioner now claims, shows that counsel's prior testimony was "false," Pet. for Cert. 19. That is not so. Although counsel stated at one point that he was "sure" he had argued the impulsive-killing point, a few lines earlier in the transcript he had said that "I would *assume* that I argued [it]" (emphasis added), and had made clear that "a lot of this is really not from actual recollection." Tr. 70–71 (Nov. 10, 1982). Petitioner's habeas counsel understood the import of this, describing (in his post-hearing brief) trial counsel's testimony to have been that "he *probably* argued that the killing was impulsive and not planned." Petitioner's Post-Hearing Brief in No. C80–247R (ND Ga., Dec. 2, 1982), p. 25, n. 6 (emphasis added); see also Objections to Magistrate's Report and Recommendation in No. C80–247R (ND Ga., Sept. 12, 1983), p. 8, n. 1 (same).

There is absolutely zero likelihood that counsel's misrecollection (or misreconstruction) that he had made an "impulsiveness" argument to the jury made the difference in the 1986 finding that his assistance was not ineffective.

Petitioner's ineffectiveness contention had not been directed to the inadequacy of counsel's closing argument, but rather to his failure to introduce mitigating *evidence*—character witnesses and the like—during the sentencing phase. See Petition for Writ of Habeas Corpus (Dec. 3, 1980), ¶49, p. 12, Petitioner's Post-Hearing Brief (Dec. 2, 1982), pp. 17–30, Magistrate's Report and Recommendation (Aug. 26, 1983), pp. 8–18, and Objections to the Magistrate's Report and Recommendation (Sept. 12, 1983), pp. 2–12, in No. C80–247R (ND Ga.); *Dobbs* v. *Kemp*, 790 F. 2d 1499, 1513 (CA11 1986), modified in part, 809 F. 2d 750 (CA11 1987). In addressing that contention, neither the District Court nor the Court of Appeals relied on the content of the closing argument, for the obvious reason that it does not constitute evidence. The District Court described the closing argument in setting forth the events of the sentencing phase, but did not mention it in its legal analysis, ruling instead that counsel had made a "reasonably substantial investigation" in searching for witnesses to testify on petitioner's behalf and a "reasonable tactical decision not to present evidence based on the information before him." *Dobbs* v. *Zant*, No. C80–247R (ND Ga., Jan. 13, 1984), p. 25. In affirming the District Court, the Court of Appeals elaborated on what it thought was the crucial "tactical decision" of the trial counsel (which was *not* a decision to omit evidence of mitigation in favor of a stunning closing argument): "Knowing of [petitioner's] poor reputation in the community, [counsel] testified in the district court that he did not want to put on any 'positive' character testimony for fear that it would not be persuasive and would prompt damaging counter evidence from the prosecution." *Dobbs* v. *Kemp*, 790 F. 2d, at 1513–1514. The closing argument was mentioned only in a footnote, which stated: "Although [counsel] did not present any mitigating evidence, his testimony in the district court reveals that he did make a closing argument in mitigation." *Id.*, at 1514, n. 15.

I think it unimaginable that, if this transcript had been available in 1986—showing that only Justice Brennan's

moving *Furman* argument, and not also an "impulsiveness" argument had been made—the Court of Appeals would have found that there *was* ineffective assistance of counsel. (Indeed, if it were our practice to correct technical errors I would vote to reverse a finding that assistance otherwise effective was rendered ineffective by that omission.) But I think it soars beyond the unimaginable, into the wildly delirious, to believe that the Court of Appeals will find that the newly discovered transcript demonstrates such "manifest injustice" that it warrants making an exception to the law-of-the-case doctrine, so that the already-decided ineffectiveness question should be reopened. There was, in short, no reason to grant this petition and correct this (admittedly clear) technical error, except to place another obstacle in the way of a death penalty that has been suspended within this Court's "death-is-different" time warp since 1974.